(1)

No. 97- 97 - 59 JUL 7 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ANTHONY DE MEO,

Petitioner,

—v.—

SMITH BARNEY INC., TRAVELERS, INC. and TONI ELLIOTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, MANDAMUS

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QUESTIONS PRESENTED

1. In dismissing an appeal from an order compelling arbitration of an age discrimination claim, did the Second Circuit err for reasons set forth in conflicting decisions in the Ninth and Seventh Circuits, and also in light of principles established by Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962), and Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 957, 2 L.Ed.2d 988 (1959)?

2. Is an order compelling arbitration, notwithstanding a timely demand for a jury trial of whether an agreement to arbitrate had been made, contrary to the Seventh Amendment and Section 4 of the Federal Arbitration Act?

3. Is the mandatory waiver of statutory jury trial rights by virtue of the arbitration clause of an obsolete boilerplate form utilized by the securities industry in 1972, as applied to age discrimination claims not then in existence, but arising more than 20 years later, and involving a different employer, violative of the Age Discrimination in Employment Act ("ADEA"), as amended by the Older Workers Benefit Protection Act ("OWBPA")?

LIST OF PARTIES TO PROCEEDING BELOW

ANTHONY DE MEO,

Petitioner,

v.

SMITH BARNEY INC., TRAVELERS, INC. AND TONI ELLIOTT,

Respondents.

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No. 97-_____

In the Supreme Court
of the
United States

October Term, 1997

ANTHONY DE MEO,

Petitioner,

v.

SMITH BARNEY INC., TRAVELERS, INC. AND TONI ELLIOTT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Anthony DeMeo, plaintiff in the proceeding below, respectfully requests the issuance of a writ of certiorari or, in the alternative, mandamus to review the Order of the United States Court of Appeals for the Second Circuit dated April 8, 1997, denying petitioner's petition for a writ of mandamus, and the Order of the United States Court of Appeals for the Second Circuit dated April 8, 1997, dismissing petitioner's appeal.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit, In re: Anthony DeMeo, Petitioner, Dkt. No. 97-3024, dated April 8, 1997, denying the petition of Mr. DeMeo for a writ of mandamus is set forth in the Appendix at page 3a. The Mandate of the United States Court of Appeals for the Second Circuit is in the Appendix at 4a. The Order of the United States Court of Appeals for the Second Circuit, dated April 8, 1997, dismissing plaintiff's appeal is set forth in the Appendix at 5a to 7a. The transcript of the oral argument before the Second Circuit is in the Appendix at 8a to 19a. The Order of the United States District Court for the Southern District of New York, DeMeo v. Smith Barney, Inc., et al., 95 Civ. 5791 (S.D.N.Y. 1996), is in the Appendix at 20a to 24a.[1]

JURISDICTION

The Order of the Court of Appeals denying petitioner's petition for a writ of mandamus was entered on April 8, 1997. (4a) The Order of the Court of Appeals dismissing petitioner's appeal was entered on April 8, 1997. (7a) The jurisdiction of this Court arises under 28 U.S.C. § 1254(1) or, in the alternative, under the All Writs Act, 28 U.S.C. § 1651(a). See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962); Schlagenhauf v. Holder, 379 U.S. 104, 109 (1964); 16B Wright-Miller-Cooper, Federal Practice and Procedure, § 4005, p. 111 (2d Ed. 1996).

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[1] Citations followed by the suffix "a" refer to the Appendix which is annexed hereto.

STATUTES INVOLVED

The statutes involved are the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) ("OWBPA"), and the Federal Arbitration Act, 9 U.S.C. § 1-16, particularly 9 U.S.C. § 4. The text of the statutes is set forth in the Appendix at 25a to 30a.

STATEMENT OF THE CASE

The effect of the decisions below is to compel petitioner DeMeo to arbitrate a 1994 age discrimination claim that he could not have anticipated having when, in 1972, he was required to sign, as a requirement of his employment, a boilerplate securities industry form, now expired obsolete and long since abandoned, in order to take a required examination. (53a-58a)

The District Court granted respondents Smith Barney Inc., et al., an order staying the prosecution of Mr. DeMeo's age discrimination case filed under the Age Discrimination in Employment Act, 29 U.S.C. § 623, under date of August 1, 1995, and compelling arbitration rather than first submitting to a jury, pursuant to Section 4 of the Federal Arbitration Act (9 U.S.C. § 4) (20a-24a), the disputed fact issue raised by Mr. DeMeo's affidavit of whether he had agreed to arbitrate such dispute.

The United States Court of Appeals dismissed Mr. DeMeo's appeal for lack of appellate jurisdiction (7a) and denied his petition for a writ of mandamus. (3a)

The pertinent language from the boilerplate of the 1972 document generated by the New York Stock Exchange and CBWL-Hayden Stone, Inc., relied upon by respondents, none

of whom are parties to the document, reads as follows (84-86a):

> ". . . in consideration of the New York Stock Exchange, Inc.'s approving this application, I submit myself to the jurisdiction of such Exchange, and I agree as follows:
>
> * * *
>
> "(j) I agree that any controversy between me and any member or member organization or affiliate or subsidiary thereof arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure prescribed in the Constitution and rules then obtaining of the New York Stock Exchange, Inc." [Emphasis added.]

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE OF THE CONFLICT BETWEEN THE SECOND AND OTHER CIRCUITS, AND IN LIGHT OF THE POSITION OF THE EEOC

The District Court's decision acknowledged the direct conflict between the Second Circuit and the Ninth Circuit on the public policy issue raised by the Ninth Circuit's decision in Prudential Insurance Co. of America v. Lai, 42 F.3d 1299, 1304, 1305 (9th Cir. 1994), cert. denied, ___ U.S. ___ , 116 S.Ct. 61 (1995), which the District Court considered to be "unpersuasive." (21a)

Since then, the Ninth Circuit has ruled that the waiver language comprising such an arbitration clause is unenforceable unless it puts the plaintiffs specifically "on notice that they were bound to arbitrate Title VII claims." Renteria v. Prudential Insurance Company of America et al., 113 F.3d 1104, 1108 (9th Cir. 1997).

For the reasons discussed in Point II below, the Older Workers Benefit Protection Act ("OWBPA") a fortiori would compel the same result as to age discrimination claims brought under the ADEA as the Ninth Circuit reached with regard to Title VII claims.

The uncertainty in the Circuits on the arbitration versus litigation issue involving such discrimination claims is exemplified by Pryner v. Tractor Supply Company, et al., 109 F.3d 354, 365 (7th Cir. 1997), in which the Seventh Circuit agonized over whether, in the context of the arbitration clause in a collective bargaining agreement, "enough [is] left of Alexander [Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)] to compel a decision in favor of the plaintiffs' [rights

to litigate instead of being forced to arbitrate]. . . ," in light of this Court's decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

The Seventh Circuit's opinion states, "Only the Supreme Court can answer that question; and we are timid about declaring decisions by the Supreme Court overruled when the Court has not said so. Khan v. State Oil Co., 93 F.3d 1358, 1364 (7th Cir. 1996), cert. granted, 117 S. Ct. 941 (1997). The conservative reading of Gilmer is that it just pruned some dicta from Alexander--and it certainly cannot be taken to hold that collective bargaining agreements can compel the arbitration of statutory rights." (Ibid.)

A stay of judicial proceedings in favor of arbitration therefore was denied by the Seventh Circuit on the basis of Alexander v. Gardner-Denver Co., supra.

It is submitted that the mandatory securities-industry arbitration clause here involved gives rise to questions similar to those presented by an arbitration clause in a collective bargaining agreement presented in Pryner, supra.

This Court's opinion in Gilmer contains dictum in a footnote that inferentially supports the "knowing" requirement of the two recent Ninth Circuit decisions cited above. Although Gilmer involved a claim that arose in 1987, before the effective date of the Older Workers Benefit Protection Act, which is applicable to invalidate the waiver of any "right or claim" in ADEA cases unless such waiver is "knowing and voluntary," 29 U.S.C. § 626(f)(3), the Court's opinion noted the existence of such requirement. (500 U.S. at 28, fn. 3.)

The importance of this Court's review of the issue is also shown by the fact that the Equal Employment Opportunity Commission is taking the position in various courts around the

country that such mandatory arbitration requirements are invalid on public policy grounds. See, e.g., Duffield v. Robertson Stephens & Co., No. C-95-0109-EFL (N.D. Cal.) (amicus brief filed by EEOC); Cosgrove v. Shearson Lehman Bros., No. 95-3432 (6th Cir.) (amicus brief filed by EEOC); EEOC v. River Oaks Imaging & Diagnostic, Civ. A. H-95-75 (S.D. Tex.); EEOC v. Midland Food Services, LLC, No. 1:96-MC-107 (N.D. Ohio); Johnson v. Hubbard Broadcasting, Inc., No. 4-96-cv-107 (D. Minn.) (amicus brief filed by EEOC); Pierre Levy, Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights, 26 N.M. L. REV. 455, 478 n.193 (1996), describing the EEOC's objections to mandatory arbitration.

Judicial notice of the ferment which the issue is currently provoking may be taken of an item in the Wall Street Journal, dated June 20, 1997, p. B2, indicating that the National Academy of Arbitrators and the American Arbitration Association have recently issued statements opposing mandatory arbitration in such disputes.

II. THE WRIT SHOULD BE GRANTED BECAUSE OF THE OWBPA'S RESTRICTIONS AGAINST WAIVER

The importance of this Court's consideration of the matter is shown by the District Court's conclusion that the non-waiver provisions of the OWBPA do not apply to jury trial rights that are granted under the ADEA (22a)

Contrary to the District Court's assumption (22a) the determination of whether such waiver is "knowing and voluntary" is itself a question that is required to be determined by a jury under the OWBPA. 29 U.S.C. § 626(c)(2).

Disregarded by the District Court was the principle that the boilerplate used by the securities industry in 1972 was subject to the rule requiring ambiguous language to be construed against the party that drafted it as established by this Court's decision in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63, 115 S.Ct. 1212 (1995).

Moreover, the burden of proof that the waiver was "knowing and voluntary" is placed by the OWBPA on the employer, Smith Barney Inc. 29 U.S.C. § 626(f)(3).

In indicating that the provisions of the OWBPA providing protection against inadvertent waivers is limited only to "claims," but does not embrace within its scope the "right" to utilize "a specific forum" to determine those claims, the District Court's order errs as a matter of law. (22a)

Contrary to the District Court's conclusion, the OWBPA amendment to the ADEA provides that "An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." (29 U.S.C. § 626(f)(1); emphasis added.)

To be effective, any such waiver document is required to refer specifically to the statutory "rights or claims" waived under the statute (29 U.S.C. § 626(f)(1)(B)), subject to a number of restrictions that plainly would rule out the long obsolete and abandoned 1972 application form respondents rely upon. (Emphasis added.)

Minimum requirements under the OWBPA for an effective waiver violated by the District Court's order include the following:

> The waiver must be part of a written agreement written in a manner calculated to be understood

by the employee signing it. 29 U.S.C. § 626(f)(1)(A);

The waiver must specifically refer to rights and claims arising under Age Discrimination in Employment Act. 29 U.S.C. § 626(f)(1)(B);

The waiver must not waive "rights or claims" that may arise after the date the waiver is executed. 29 U.S.C. § 626(f)(1)(C);

The agreement containing the waiver must provide consideration (i.e., some compensation or other form of value) in addition to what the employee receives by contract or law if he does not agree to the waiver. 29 U.S.C. § 626(f)(1)(D); and

The employee must be advised in writing to consult with an attorney prior to executing the agreement. (29 U.S.C. § 626(f)(1)(E).

Prominently stated in the OWBPA as among the "rights" that are not subject to waiver is the right to "bring a civil action in any court of competent jurisdiction" where such person "shall be entitled to a trial by jury. . . . " (29 U.S.C. § 626(c)(1) & (2).)

The statutory jury trial rights are applicable "regardless of whether equitable relief is sought by any party in such action," such as a motion to compel arbitration. (29 U.S.C. § 626(c)(2).) Thus the statutory right of a jury trial that is granted "regardless of whether equitable relief is sought by any party in such action" prevails over inconsistent provisions in the Federal Arbitration Act. Therefore, an order compelling

arbitration, which by definition is both inconsistent with such right of jury trial, and also a form of equitable relief, therefore is appealable under 28 U.S.C. § 1291 and § 1292(a)(1), since specific performance is long established to be a form of equitable relief. See 16 Wright-Miller-Cooper, Federal Practice and Procedure § 3922, p. 76 (2d Ed. 1995).

As stated in Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 fn. 21 (1973), "Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of the courts to assure the full availability of this forum." (Emphasis added.)

This Court has held that unless the contract itself specifies otherwise, the courts rather than the arbitrator must decide whether the parties agreed to arbitrate an issue. See First Options of Chicago, Inc. v. Kaplan, ___ U.S. ___, 115 S.Ct. 1920, 1923-24, 131 L.Ed.2d 985 (1995). The Court's holding "suggests that the related and antecedent issue of whether an agreement to arbitrate is a contract of adhesion, fraudulently induced, or otherwise revocable, is an issue for the court as well, because essential to the First Options inquiry is the assumption that an agreement to arbitrate was made voluntarily." Availl, Inc. v. Ryder System, Inc., 913 F.Supp. 826, 831 (S.D.N.Y. 1996) (Mukasey, J.); see also Maye v. Smith Barney, Inc., 897 F. Supp. 100, 106 n.3 (S.D.N.Y. 1995).

The District Court decided respondents' motion to stay the litigation and compel arbitration solely on the basis of affidavits notwithstanding the existence of disputed fact issues as to whether there was an agreement to arbitrate the dispute.

In doing so, the District Court relied upon a New York Stock Exchange letter dated August 10, 1972, as support for its statement that Mr. DeMeo "did take and pass [the registered

representatives'] exam, which resulted in the approval of his Form RE-1." (21a)

However, this is inconsistent with a subsequent letter dated October 23, 1972, which states that the New York Stock Exchange was "closing our files" on Mr. DeMeo in view of lack of further action by the firm of Hayden Stone because the processing of the application had not been completed. (91a) The approval of the application by the New York Stock Exchange was explicitly made a condition precedent of the applicability of the arbitration clause, as shown in the portion of the boilerplate quoted above at p. 4.

Additional disputed fact issues ignored by at the District Court presented by Mr. DeMeo's affidavit include:

> (1) Whether the boilerplate application form is inapplicable because the 1972 document is obsolete on a form that was long ago abandoned by the New York Stock Exchange (DeMeo Aff. ¶¶ 37-52) (57a-60a);
>
> (2) Whether the application form covers within its scope the age discrimination claims that are the subject of this lawsuit (DeMeo Aff. ¶¶ 53-55) (60a); and
>
> (3) Whether said application form is inapplicable to some of the respondents who are not parties to it. (DeMeo Aff. ¶¶ 57-59). (61a)

Section 16 of the Federal Arbitration Act, added in 1988, contemplates compliance with the jury trial requirements of Section 4 since Section 16 (b)(2) refers to an order "directing arbitration to proceed under section 4 of this title . . . ." (9 U.S.C. § 16(b)(2); emphasis added.) Section 4 of the Act

contains explicit jury trial rights invoked by Mr. DeMeo.

Therefore, in view of the disputed fact issues shown in the affidavit of Mr. DeMeo in opposition to Smith Barney's motion (51a-69a), the motion to stay the litigation and compel arbitration should have been denied by the District Court. As stated in McAllister Brothers, Inc. v. A & S Transportation Co., 621 F.2d 519, 524 (2d Cir. 1980):

> ". . . the district court was required to hold an evidentiary hearing on McAllister's claim that Pollution and PCI are bound by the contract rather than resolve the issue solely on the basis of the parties' affidavits and memoranda of law."

Because there has been no finding by a jury of whether there is "an agreement in writing for such arbitration," as required by 9 U.S.C. § 4, appellate jurisdiction exists under 28 U.S.C. § 1291. See Interocean Shipping Co. v. National Shipping & Trad Corporation, 462 F.2d 673, 675 fn. 3 (2d Cir. 1972), which states:

> "An order compelling arbitration under § 4 of the Federal Arbitration Act is a final order and is appealable under 28 U.S.C. § 1291 (1970). Hellenic Lines, Ltd. v. Louis Dreyfus Corporation, 372 F.2d 753, 754 (2 Cir. 1967); Chatham Shipping Co. v. Fertex S.S. Corp., 352 F.2d 291, 294 (2 Cir. 1965).

See also Government of United Kingdom v. Boeing Company, 998 F.2d 68 (2d Cir. 1993).

Interbras Cayman Co. v. Orient Victory Shipping Co. S.A., 663 F.2d 4, 7 (2d Cir. 1981), holds that the District Court

should not have decided such issues on affidavits, contrary to its procedure in the instant case, but is required to "proceed summarily to a trial thereof" before a jury in accordance with 9 U.S.C. § 4.

III. THE WRIT SHOULD BE GRANTED IN LIGHT OF THE LINE OF CASES GIVING PRIORITY TO THE RIGHT OF JURY TRIAL

The decision of the Second Circuit is inconsistent with the decisions of this Court giving priority to the claim of a right of jury trial. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 957, 2 L.Ed.2d 988 (1959).

The importance of review by this Court of the decisions below giving priority to arbitration over jury trial rights is shown by its inconsistency both with the language of the ADEA and Beacon Theatres v. Westover, 359 U.S. 500, 510-511 (1959), which states:

> "If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to

> preserve jury trial. As this Court said in Scott v. Neely, 140 U.S. 106, 109-110: 'In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.' This long-standing principle of equity dictates that only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules, we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." (Emphasis added.)

Because the District Court in the instant proceeding relegated Mr. DeMeo's age discrimination claim to an arbitration process to which he had not consented an important question is also presented involving Seventh Amendment rights.

Mr. DeMeo's denial that there is a contract in effect that requires arbitration of the dispute is a common law contract issue of the type which the Seventh Amendment requires to be preserved for jury determination. The Seventh Amendment states:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

As stated in Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 536 U.S. 525, 537 (1958):

"The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence--if not the command--of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. Ibid. (footnote omitted)."

CONCLUSION

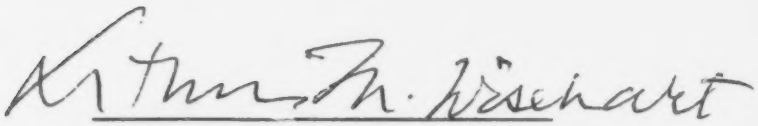
Because constitutional rights under the Seventh Amendment are involved, as well as novel issues under the OWBPA, and a split in the Circuits on a matter of public policy, review by this Court of the issues presented is of great importance.

For the foregoing reasons, the petition should be granted.

July 7, 1997

Respectfully submitted,

WISEHART & KOCH



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SDNY
WOOD
95-cv-5791

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 8th day of April, one thousand nine hundred and ninety-seven.

BEFORE:

Hon. Ellsworth A. Van Graafeiland
Hon. John M. Walker
Circuit Judges
Hon. J. Garvan Murtha*
District Judge

FILED
April 08, 1997
George Lange III, Clerk

Docket No. 97-3024

IN RE:

ANTHONY DE MEO,

Petitioner

A petition for a writ of mandamus having been filed,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

George Lange III, Clerk
By: /s/_____
Arthur M. Heller
Administrative Attorney

* Hon. J. Garvan Murtha, United States District Court for the District of Vermont, sitting by designation.

MANDATE

UNITED STATES COURT OF APPEALS SDNY
FOR THE SECOND CIRCUIT Wood
95-CV-5791

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ISSUED AS MANDATE
April 8, 1997

T1080 PAGE 1

United States Court of Appeals
For the Second Circuit

Each motion must be accompanied by a supporting affidavit.

DE MEO,

V.

SMITH BARNEY INC., et al.

96-9640

NOTICE OF MOTION

Dismissal of Appeal for Lack of Appellate Jurisdiction

MOTION BY:

Michael Delikat

Orrington, Herrington
& Sutcliffe LLP
666 Fifth Avenue
New York , New York 10103
(212) 506-5000-5230

OPPOSING COUNSEL:

Arthur M. Wisehart

Wisehart & Koch
19 West 44th Street
Suite 412
New York, New York
(212) 730-0044

Has consent of opposing counsel:		
A. been sought?	X Yes	No
B. been obtained?	Yes	X No
Has service been effected?	X Yes	No
Is oral argument desired?	X Yes	No

(Substantive motions only)
Requested return date: April 8, 1997
(See Second Circuit Rule 27(b))

Has argument date for appeal been set:

A. by scheduling order? X Yes X No

B. by firm date of argument notice? Yes X No

C. If Yes, enter date: no earlier than June 16,1997

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? Yes No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? Yes No

If No, explain why not:

Will the parties agree to maintain the status until the motion is heard? Yes No

Judge or agency whose order is being appealed:
Honorable Kimba M. Wood, U.S.D.J.

Brief statement of the relief requested:
Order dismissing appeal for lack of appellate jurisdiction.

By: (Signature of attorney)

/s/

Signed name must be printed beneath

Michael Delikat (MD-1165)

Appearing for: (Name of party)

Appellees

Date
February 28, 1997

Appellant or Petitioner:
Plaintiff Defendant

Appellee or Respondent
Plaintiff X Defendant

ORDER

Kindly leave this space blank

BEFORE: VAN GRAAFEILAND, WALKER, CJJ and MURTHA, DJ.

IT IS HEREBY ORDERED that the motion be and hereby is granted XXXXXd

FOR THE COURT,
GEORGE LANGE III, Clerk
By:/s/_____
Arthur Heller
Administrative Attorney

April 8, 1997
Date

FILED
April 8, 1997

[1]

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

----------x

ANTHONY DeMEO
Plaintiff,

vs

SMITH, BARNEY, INC., THE TRAVELERS, INC., and TONI ELLIOTT.

Defendants.

----------x

CORRECTED TRANSCRIPT OF ORAL ARGUMENT

April 8, 1997
One Foley Square
New York, New York

BEFORE:
HON. ELLSWORTH A. VAN GRAAFEILAND

HON. JOHN M. WALKER, JR. - Presiding

HON. J. GARVAN MURTHA - Sitting By Designation

[2]

APPEARANCES:

WISEHART & KOCH
Attorneys for Plaintiff - Appellant
19 West 44th Street
New York, New York 10036
(212) 730-0044

BY: ARTHUR WISEHART, ESQ.

ORRICK HERRINGTON & Sutcliffe, LLP,
Attorneys for Defendants - Appellees
666 Fifth Avenue
New York, New York 10103
(212) 506-5000

BY: MICHAEL DELIKAT, ESQ.

[3]

THE COURT: I will now hear DeMeo.

AN ATTORNEY: Good morning. May it please the court.

I am Mike Delikat of Orrick Herrington & Sutcliffe attorneys for the lead party today, Smith Barney defendants and Elliot.

Despite appellant's efforts to get to the merits of his underlying dispute, this motion presents a routine question of appellate jurisdiction, and our motion is to dismiss the appeal today, because Judge Kimba Wood's order compelling arbitration was clearly an interlocutory and the order under 28 USC 1291 her order is simply not subject to appeal at this time.

This is a classic example of an imbedded and not an independent proceeding, and as a result there is no appellate review. Moreover, Section 16 of Federal Arbitration Act expressly prohibits review of an interlocutory order such as this and the Court found in the Filanto case, recognized the significance of the 1988 amendments to the federal arbitration act of

[4]

1988 expressing a public policy limiting appeals from orders directing arbitration.

Because these principles seem so clear and the results seem so inevitable, it seems as though the common focus has shifted towards arguing that he should have had a jury trial right below on the issue of whether or not a valid arbitration agreement was formed.

As recently as February of 1997 this court in the Distajo matter clearly set forth the principle that there is no automatic entitlement to a jury trial on the issue of whether an arbitration agreement was made.

The burden is clearly on the party, in this case DeMeo, resisting arbitration to show that he is entitled to a jury

trial and he can only do that if he can demonstrate if there is a disputed issue of a material fact to be tried.

There is a heavy burden, and the courts have expressed that Mr. DeMeo must have produced evidence to substantiate this

[5]

denial that a -- arbitration even existed.

Here, I guess clearly Judge [Wood] correctly concluded that there was no genuine issue for trial, no disputed issue of fact with respect to the issue for trial with respect to the underlying agreement to arbitrate and therefore this request for the jury trial right did not need to be granted in order to get to this point today.

For those reasons I think it is clear that there is no appellate jurisdiction with respect to the appeal, and we would respectfully request that the court decide on the motion to dismiss before we have an obligation to submit a brief on the underlying appeal which is now slated for me 26th. Thank you.

THE COURT: Very well. Mr. DeMeo.

MR. WISEHART: May it please the, Court, I am Arthur Wisehart.

THE COURT: Yes.

MR. WISEHART: Of course we take issue with the contentions made that the

[6]

not appealable. We think it is governed by the case of United Kingdom against Boeing in which it was specifically held that under 28 USC 1291 an order compelling arbitration was appealable under the Interocean case, and that is a 1988 decision. And we think it applies in this case, because this again is an order compelling arbitration. And the argument that they make on the other side does not address that issue, that is the law of this circuit.

In the case of United Kingdom against Boeing, there was an agreement to arbitrate, but the agreement did not go so far as to require separate arbitrations to be consolidated. And therefore, the court held that the order compelling arbitration on a consolidated basis could be reviewed under 28 USC 1291. And it cited the Interocean case, and that is the law of this Circuit, it is appealable and jurisdiction does exist for that purpose.

Furthermore, the defendants argue that under the leading case of Gilmer the issue

[7]

is not raised, whereas in Gilmer in footnote 3, it specifically states referring to the Older Workers Benefit and Protection Act, that agreements to arbitrate have to be shown to be knowing and voluntary. The issue --

THE COURT: I want to hear you discussing the distinction between the imbedded and an independent proceeding.

MR. WISEHART: We have discussed that in

our memorandum. Our position is --

THE COURT: This is an imbedded proceeding; is it not?

MR. WISEHART: Our position is, it is their motion to compel and that their motion to compel is itself an independent proceeding. We did not raise this in our pleadings.

THE COURT: That would be true in every proceeding.

MR. WISEHART: I don't believe so, your Honor. In other proceeding involve stays. This is a motion that they made under Section 4 of the Federal Arbitration Act. Section 16 of the Federal Arbitration

[8]

Act, which they base their argument upon clearly states that it applies only to disputes under Section 3 or Section 4.

Both Section 3 and Section 4 say that the predicate of their applicability is the existence of an agreement to arbitrate.

We therefore say that the predicate or application of the Federal Arbitration Act is not established for the purpose of this proceeding or for the purpose of this appeal, and if Section 16 does not apply, and that their motion to compel is just the same as any other claim, cause of action.

Furthermore, I would point out in this instance, the Older Workers Benefit Protection Act, which we have referred to extensively in our memorandum --

THE COURT: Do you have a case in which an independent proceeding is brought by someone other than the plaintiff, who is seeking an order to compel or prohibit arbitration?

MR. WISEHART: I think that that is -- I think that is involved in the U.K.

[9]

against Boeing.

THE COURT: The independent cases seem to be ones in which the the plaintiff is seeking an order compelling the arbitration.

No other party is seeking any other relief. You brought an independent, you brought a separate claim, you brought a claim for relief, independent of it for damages, apart from the arbitration, you did not seek arbitration and sought damages and injunctive relief.

MR. WISEHART: Right. We did not seek a declaratory order that arbitration did not apply, because there is no arbitration agreement. So, therefore it is their cross, their motion which in our view is in the nature of an independent proceeding. It is the same as if they made a counterclaim or did whatever.

It is not the same as a stay under Section 3 of the Federal Arbitration Act, it is a request under Section 4 for an order to compel.

[10]

And I just want to inject this thought, your

Honor.

Under section, under the Older Workers Benefit Protection Act, which became effective in 1990, it states specifically that you cannot have a waiver of rights, and those rights include the right to jury trial. So far as I know this is an issue that has not been addressed by this court ever before. Now, the significance of that point is that the right to jury trial is set forth in the Older Workers Benefit Protection Act and the ADEA, which states specifically that it shall apply even in cases in which equitable remedies are sought. So you have a case in which the other side seeks equitable remedies --

THE CHAIRPERSON: What we are talking about now is the appealability of issues.

MR. WISEHART: Right. I understand that.

THE COURT: These issues are all appealable. They are all appealable at the right time. And you know, you can attack

[11]

the arbitration after it occurs, just as easily as now.

MR. WISEHART: Oh, that is not true, your Honor. That is the problem.

THE CHAIRPERSON: Why not? Why?

MR. WISEHART: Because you are hit with contentions about collateral estoppel. That is the whole problem of this.

And you go through the --

You know, in the Middle Ages they had a procedure called peine fort et dure. You have to go through an entire arbitration procedure, you have to go through --

THE COURT: We do that all of the time because piecemeal appeals are so disfavored. You waited until the end of the proceeding.

MR. WISEHART: Your Honor, let me just bring up --

THE COURT: To carry your argument --
excuse me -- to carry your argument to a logical extreme, virtually every time a person is aggrieved by a district court ruling that necessitates further proceedings

[12]

in the lower courts, they could come up here and appeal. And that is just not the way we operate.

It has to be a completely separate and inseverable, independent proceeding in order to contain this kind of appealability that you are seeking. And it is --

MR. WISEHART: May just interject a thought?

THE COURT: Go ahead.

MR. WISEHART: The decision of the district courts in this case compelling arbitration was based solely on conflicting fact affidavits. This court has said over and over again, it will not approve the granting of summary judgment, which this is like, on the basis --

THE COURT: Oh, this is not summary

judgment. This is a simple case that comes up all of the time. They don't want to arbitrate. The arbitrators will decide whether they have got the jurisdiction, and if they are wrong, you come up again.

MR. WISEHART: Well, your Honor, let me

[13]

just give you an example of another case in the district --

THE COURT: Ah --

THE WISEHART: Can I?

THE COURT: I think we have got your point, and you have made it very clearly, counsel.

MR. WISEHART: Well, I know, but I --

THE COURT: The meaning --

MR. WISEHART: I am not going to repeat it. I am going to point to another court, district court case that will show you how they don't come up the same way time after time. This is the case by Judge Sheindlin, which we cite in our papers, and she goes through an extensive program to make sure that there was in fact an agreement that existed, that it was not induced under any false pretenses, that there was ample discovery in order to establish whether or not there is a --

THE COURT: You can make the same arguments to the arbitrator.

MR. WISEHART: No, we can't, because

[14]

the arbitrators are not skilled in this area. I have here --

THE COURT: All right.

MR. WISEHART: I have an article that was just came out this week to the American, to the registered representatives in the securities industry, in which it contends at great length that the arbitration process is slanted against them. It is not the same as if this court was making the decision.

THE CHAIRPERSON: All right, counsel, we have your point.

Do you have anything further, anybody?

AN ATTORNEY: Just very briefly.

The Boeing case was an independent proceeding where it was and action to compel arbitration, and that is why the court took that one up.

The arguments that Mr. Wisehart is suggesting with the Older Workers Benefit Protection Act related only to a waiver.

This is about a forum and not about a waiver of an age discrimination claim. He

[15]

compresses an age discrimination claim in the particular proceedings.

MR. WISEHART: May I say something?

THE COURT: No.
We are prepared to rule.

We grant the motion dismissing the appeal from the order compelling arbitration, and we deny the petition for the writ of mandamus.

oOo

[16]

C E R T I F I C A T E

STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

I, Robert X. Shaw, CSR, a Notary Public within and for the State of New York, do hereby certify that the within is a true and accurate transcript of the taped proceedings taken on April 8, 1997.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of June, 1997.

/s/

ROBERT X. SHAW, CSR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ANTHONY DE MEO,

Plaintiff,

-against-

95 Civ. 5791 (KMW)
ORDER

SMITH BARNEY INC., et al.,

Defendants.
----------x

WOOD, D.J.

Presently before the court is defendants' motion to compel arbitration in this action based on age discrimination in employment. The Federal Arbitration Act establishes a federal policy in favor of arbitration; courts should not look upon arbitration as a "second best" solution. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 225-26 (1987); McMahan Securities Co. v. Forum Capital Markets L.P., 35 F.3d 82, 86 (2d Cir. 1994).

Plaintiff's defenses to the motion are meritless. In determining whether a motion to compel arbitration should be granted, the Second Circuit has stated that courts must be "mindful that the 'federal policy favoring arbitration requires [courts] to construe arbitration clauses as broadly as possible' and that 'arbitration should be ordered unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" McMahan Securities Co., 35 F.3d at 86 quoting S.A. Mineracao Da Trindade-Samitri v. Utah International Inc., 745

F.2d 190, 194-95 (2d Cir. 1984). The arbitration clause in question -- which applies to "any controversary arising out of [the signer's] employment or the termination of [the signer's] employment" -- unquestionably covers the employment discrimination claim at issue in this action.

Initially, plaintiff apparently contends that I should not grant this motion to compel arbitration because plaintiff understood the arbitration clause at issue to be limited to controversies "involving the trading of securities for customers, and did not [understand the clause to] include age discrimination 'claims."' Essentially, plaintiff is arguing, based on the holding in Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994), that in order to grant a motion to compel arbitration this court must find that plaintiff knowingly agreed to forego his statutory remedies in favor of arbitration. However, courts in this district that have considered this issue have found the Lai decision unpersuasive, as do I. See Maye v. Smith Barney Inc., 897 F. Supp. 100 (S.D.N.Y. 1995); Hall v. MetLife Resources, No. 94 Civ. 0358, 1995 WL 258061 at *3-4 (S.D.N.Y. May 3, 1995). Plaintiff's contention is particularly unconvincing in this case, in which the arbitration clause at issue is phrased in terms that would clearly alert the average reader that the clause was intended to cover employment disputes such as discrimination claims.

Next, plaintiff contends that no valid arbitration clause exists because the New York Stock Exchange (the "NYSE") Form RE-1 containing the arbitration clause that he signed was never approved. Plaintiff's claim that his Form RE-1 was never approved is controverted by record of the Central Registration Depository submitted by plaintiff and a letter from the NYSE dated August 10, 1972, submitted by defendants. Although plaintiff was late in taking the required examination to become a registered representative, he did take and pass that exam, which resulted in the approval of his Form RE-1.

Finally, plaintiff contends that because he is bringing an age discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), his claims are not subject to compulsory arbitration. Insofar as plaintiff is arguing that his claims are not arbitrable because in signing the arbitration clause at issue he was not knowingly agreeing to arbitrate age discrimination claims, I have already dealt with this argument above, in my discussion of Lai. Insofar as plaintiff is arguing that the provisions of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) ("OWBPA") which require a knowing waiver of age discrimination claims, apply here, I note that the provisions require a knowing waiver of "claims," not of a specific forum.

Moreover, because the arbitration clause at issue was clearly worded to alert the average reader that employment discrimination claims were subject to compulsory arbitration, plaintiff cannot make a credible claim that he did not knowingly agree to arbitrate any potential discrimination claims.[1]

---

[1] Plaintiff argues that even if his claims against Smith Barney, Inc. ("Smith Barney"), which is a member of the NYSE, are subject to compulsory arbitration, his claims against Toni Elliot and The Travelers Group, both non-members of the NYSE, are not subject to compulsory arbitration. The Travelers Group is an affiliate of Smith Barney. The arbitration clause signed by plaintiff specifically stated that he agreed to arbitrate any controversy between himself and any NYSE member organization, or affiliate of an NYSE member organization. In addition, the rules of the NYSE, which plaintiff agreed to follow, require the arbitration of "any dispute, claim or controversy between a . . . nonmember [such as The Travelers Group] and . . . [an] associated person [such as plaintiff] arising in connection with the business of such associated person in

Defendants request that I award them their costs, expenses and attorneys' fees in connection with this motion without stating any legal basis for this request or presenting any argument in its favor. Defendants are directed to submit a letter to the court by December 17, 1996, stating the legal and factual basis for this request. Plaintiff may submit a letter in opposition to this request by January 2, 1997. Defendants may submit a letter in reply by January 9, 1997.

Conclusion

For the reasons set forth above, I grant defendants' motion to compel arbitration and to stay this action pending the conclusion of the arbitration proceedings.[2] Plaintiff and the

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connection with his activities as an associated person . . . upon the demand of the . . . non-member." NYSE Rule 600(a).

Rule 600(a) also requires plaintiff, a non-member of the NYSE, to submit to arbitration his claims against Toni Elliott, who, as an Executive Vice President of Smith Barney, is an associated person under the direct control of Smith Barney, a member organization. See Maye 897 F. Supp. at 108-09 (employees' employment discrimination claims against individual, non-NYSE member officers of Smith Barney are subject to arbitration pursuant to NYSE Rule 600(a)).

[2] On March 18, 1996, instead of filing his opposition to the motion to compel arbitration, as he had been ordered to do by the Court, plaintiff filed a "Cross-Motion (a) For a Jury Determination of Issues Pursuant to Section 4 of the Federal Arbitration Act, (b) to Alter or Amend an Order, and (c) for Additional Discovery." After admonishment from the Court, the plaintiff filed his response to defendant's motion to compel

defendants are directed to notify this court of the status of the arbitration by May 20, 1997.

So Ordered.

Dated: New York, New York
December 2, 1996

/s/
Kimba M. Wood

United States District Judge

A copy of this Order has been mailed to counsel for each of the parties.

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arbitration. In his cross-motion, plaintiff makes substantially the same arguments he made in his response to the defendants motion to compel arbitration, which I have discussed in detail above. In addition, plaintiff contends that he is entitled to a jury determination on the question of whether an arbitration agreement existed at the time in question. I find that there is sufficient evidence in the papers submitted for me to determine that there was an arbitration agreement in effect at the time in question, and that a jury determination is not necessary.

Therefore, for the reasons set forth in this order, the plaintiff's cross-motion is hereby denied.

Constitutional and Statutory Provisions Involved

United States Constitution, Seventh Amendment:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

All Writs Act, 28 U.S.C. § 1651(a):

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Federal Arbitration Act, 9 U.S.C. § 1 et seq.

§ 1 "Maritime transactions" and "Commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class

of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction,, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

9 U.S.C. § 16 - Appeals

"(a) An appeal may be taken from --

(1) an order --

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title,

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order --

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

Pertinent Portions of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.:

29 U.S.C. § 626(c)(1):

"Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminated upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this Act.

29 U.S.C. § 626(c)(2):

"In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action."

Older Workers Benefit Protection Act,
29 U.S.C. § 626(f), in pertinent part:

(1) "An individual may not waive any right or claim under this act unless the waiver is knowing and

voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum --

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate,

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

* * *

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (@), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------x

No.

In re ANTHONY DE MEO,

Petitioner ,

CROSS-PETITION FOR
A WRIT OF MANDAMUS

----------x

ANTHONY DE MEO

Docket No. 96-9640

Plaintiff-Appellant,

-against-

SMITH BARNEY INC.,
THE TRAVELERS INC.,
and TONI ELLIOTT.

Defendants-Appellees.

----------x

PETITION FOR WRIT OF MANDAMUS, IN THE ALTERNATIVE

Anthony DeMeo, the plaintiff in the above entitled action against Smith Barney Inc., the Travelers Inc., and Toni Elliott, respectfully petitions for the issuance of a writ of mandamus pursuant to 28 U.S.C. § 1651, and Fed.R.App.P. 21, directed to the Hon. Kimba M. Wood, U.S.D.J., United States District Court for the Southern District of New York, for an order (a) reversing and vacating the Order of said Court dated December 2, 1996 (Exhibit A annexed hereto) and (b) requiring said Court to submit to a jury duly convened the issues listed below.

ISSUES PRESENTED

This cross-petition for a writ of mandamus is presented in the alternative with the request that it be considered and acted upon if the motion to dismiss on jurisdictional grounds of defendants-appellees dated February 28, 1997, is granted, contrary to Mr. DeMeo's position that it is without merit.

The issues presented are (1) whether a jury determination was required with regard to Mr. DeMeo's contention that there is no written agreement for arbitration of the claims presented in the above entitled action, (2) whether Mr. DeMeo was also entitled to a jury determination with respect to the further issue presented under the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) that there was no "knowing and voluntary" waiver by Mr. DeMeo of his right to have said right and claim under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), and for the remedies thereunder provided to be determined by a Federal Court and jury pursuant to 29 U.S.C. §§ 626(b) and 626(c), and (3) whether Mr. DeMeo should receive necessary discovery relevant thereto.

The issues are discussed in detail in the Memorandum of Law dated April 1, 1997, submitted herewith.

The facts necessary to understand the issues presented by the petition are contained in the affidavit of Arthur M. Wisehart sworn to April 1, 1997.

REASONS WHY THE WRIT SHOULD ISSUE

The writ of mandamus should issue in order to protect and preserve the jury trial rights of petitioner DeMeo from infringement.

Unless the petition is granted, the rights of petitioner DeMeo to a trial by jury of issues set forth above are threatened by being subjected to compulsory arbitration under the District Court's Order of December 2, 1996, causing irreparable injury to petitioner.

As stated in In re Hooker Investments, Inc., 937 F.2d 833, 837 (2d Cir. 1991):

> "Although we do not have jurisdiction over the Bank's attempted appeal as a matter of right from the non-final bar order, we may in appropriate circumstances treat an unsuccessful attempt to appeal as a petition for a writ of mandamus. See, e.g., Richardson Greenshields Securities, Inc., 825 F.2d at 652. Indeed, the Bank has asked us to review the bar order under our mandamus power if we should find ourselves to be without statutory appellate jurisdiction. The Bank claims that the bar order threatens its seventh amendment right to a trial by jury in the adversary proceeding, and there is a clear line of cases holding that when an otherwise unappealable order denies a claimed right to a jury trial, immediate review may be obtained by way of a petition for mandamus. See, e.g., Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472, 82 S.Ct. 894, 897, 8 L.Ed.2d 44 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 957, 2 L.Ed.2d 988 (1959); Higgins v. Boeing Co., 526 F.2d 1004, 1006 (2d Cir. 1975) (per curiam). We see no reason not to follow this practice in the bankruptcy context. See Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.), 911 F.2d 380, 387-88 (10th Cir. 1990). Though we believe

> that mandamus should be used sparingly, it is justified in this case. We therefore treat the Bank's appeal as a petition for a writ of mandamus and turn to the merits of its claim." (Emphasis added.)

Judicial review of the District Court's decision is in the public interest particularly in view of the position that the Equal Employment Opportunity Commission is currently taking in a number of cases throughout the United States.

The Equal Employment Opportunity Commission has strongly asserted the position that such compulsory arbitration provisions are unenforceable on public policy grounds in a number of cases being litigated around the country. See, e.g., Duffield v. Robertson Stephens & Co., No. C-95-0109-EFL (N.D. Cal.) (amicus brief filed by EEOC); Cosgrove v. Shearson Lehman Bros., No. 95-3432 (6th Cir.) (amicus brief filed by EEOC); EEOC v. River Oaks Imaging & Diagnostic, Civ. A. H-95-75 (S.D. Tex.); EEOC v. Midland Food Services, LLC, No. 1:96-MC-107 (N.D. Ohio); Johnson v. Hubbard Broadcasting, Inc., No. 4-96-cv-107 (D. Minn.) (amicus brief filed by EEOC); Pierre Levy, Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights, 26 N.M. L. REV. 455, 478 n.193 (1996), describing the EEOC's objections to such compulsory arbitration procedures.

Judicial review of the issues presented at this time is especially important because of the uncertain state of the law with regard to such issues in courts in various Circuits. Legal issues of first impression involving new and important matters are presented, including the applicability of the restrictions on inadvertent waiver of jury trial and other rights under the Older Workers Benefit Protection Act.

Those and similar issues appear to be headed for the

United States Supreme Court as indicated in the decision for the United States Court of Appeals for the Seventh Circuit, dated March 20, 1997, Pryner v. Tractor Supply Company, et al., _ F.3d __, 1997 U.S. App. LEXIS 5299 at *37 (7th Cir. March 20, 1997).

The petition for a writ of mandamus complies with the criteria set forth in In re Hooker Investments, Inc., 937 F.2d 833, 837 (2d Cir. 1991), and therefore should be granted.

WHEREFORE, if the Court determines, contrary to petitioner's argument in the Memorandum of Law submitted herewith, that the appeal should be dismissed for lack of jurisdiction, the petition for a writ of mandamus should be considered and granted.

Dated: New York, New York
April 1, 1997

Respectfully submitted,
/s/

Arthur M. Wisehart (AMW 4003)

WISEHART & KOCH
19 W. 44th Street - Suite 412
New York, New York 10036
(212) 730-0044
Attorneys for Petitioner/
Plaintiff-Appellant
Anthony DeMeo

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No.

In re ANTHONY DE MEO,

Petitioner ,

----------x

ANTHONY DE MEO — Docket No. 96-9640

Plaintiff-Appellant,

-against-

SMITH BARNEY INC., THE TRAVELERS INC., and TONI ELLIOTT.

Defendants-Appellees.

AFFIDAVIT IN OPPOSITION TO THE MOTION TO DISMISS THE APPEAL AND IN SUPPORT OF THE PETITION FOR A WRIT OF MANDAMUS ON BEHALF OF PLAINTIFF-APPELLANT

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ARTHUR M. WISEHART, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court, and the senior attorney of the law firm of WISEHART & KOCH, attorneys for the plaintiff-appellant, Anthony DeMeo.

2. This affidavit is respectfully submitted in opposition to the motion to dismiss on behalf of defendants-appellees dated February 28, 1997, and in support of the

petition for a writ of mandamus dated April 1, 1997, that is submitted on behalf of plaintiff-appellant DeMeo, in the alternative, should the motion to dismiss the appeal be granted for lack of jurisdiction.

3. As a preliminary matter, denial of the motion to dismiss is requested on procedural grounds. The jurisdictional issue raised by the motion is inextricably intertwined with the merits of the appeal. It is not possible to do justice to the complex and novel issues raised by the motion to dismiss in the abbreviated procedure required with regard to such motions.

4. The motion to dismiss therefore should be denied so that the issues raised can be determined appropriately in the customary manner on the basis of the full record, briefs and oral argument.

5. The decision of the District Court, by Kimba M. Wood, U.S.D.J., United States District Court for the Southern District of New York, dated December 2, 1996, annexed hereto as Exhibit 1, was decided solely on the basis of the affidavits annexed hereto with Exhibit 3, 5 and 6.

6. The complaint filed in this action is annexed hereto as Exhibit 2.

7. Exhibit 3 annexed hereto is the affidavit of Anthony DeMeo, plaintiff-appellant, sworn to June 10, 1996.

8. The affidavit of Mr. DeMeo shows that disputed issues of fact were raised by plaintiff-appellant in the District Court regarding the following matters:

(a) Whether the purported application of Mr. DeMeo on Form RE-1 dated June 20, 1972, was ever completed (DeMeo Aff. ¶¶ 5-14);

(b) Whether instead of completing the processing of the application, the New York Stock Exchange had closed its files on the matter in 1972 as a result of which the terms thereof did not ever become effective (DeMeo Aff. ¶¶ 15-26);

(c) Whether the application form is applicable in any event to the claims stated herein (DeMeo Aff. ¶¶ 27-36);

(d) Whether the application form is inapplicable for the further reason that it is obsolete and has been abandoned by the New York Stock Exchange (DeMeo Aff. ¶¶ 37-52);

(e) Whether the application form covers within its scope the age discrimination claims that are the subject of this lawsuit (DeMeo Aff. ¶¶ 53-55);

(f) Whether said application form does not apply to all of the defendants (DeMeo Aff. ¶¶ 57-59);

(g) Whether Mr. DeMeo waived his jury trial/federal court rights, or instead specifically declined to do so (DeMeo Aff. ¶¶ 60-65);

(h) Whether Mr. DeMeo's former employer, Smith Barney, was a party to the form application, or was not covered by it, and whether there was no consideration with respect to said form application (DeMeo Aff. ¶¶ 66-70);

(i) Whether Mr. DeMeo at any time executed a "knowing and voluntary" consent to arbitrate his age discrimination claims (DeMeo Aff. ¶¶ 71-74);

(j) Whether the purported agreement with revisions in the form application that would be made in the future, or the rules and regulations thereto, no matter what future changes might be made, constitute a "written" arbitration agreement at the time it purportedly was signed within the meaning of the Federal Arbitration Act, 9 U.S.C. § 4 (DeMeo ¶¶ 75-84).

9. Annexed hereto as Exhibit 4 is the cross-motion presented on behalf of Mr. DeMeo for an Order "pursuant to (A) Section 4 of the Federal Arbitration Act (9 U.S.C. § 4) requiring that a jury trial be held (1) on the issue raised by plaintiff's denial of the existence of a written agreement for arbitration of the subject matter of the suit herein arising out of the controversy between the parties, and (2) on the further issue under the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) raised by plaintiff's claim that there was no knowing and voluntary waiver by plaintiff of his right to have his age discrimination claim arising under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), and for the remedies thereunder provided be determined by a Federal Court and jury pursuant to 29 U.S.C. §§ 626(b) and 626(c), (B) Rule 59(e) of the Federal Rules of Civil Procedure, altering or amending the provisions in the Order dated March 7, 1996, denying additional discovery needed for the hearings requested in subdivision (A) above, and (C) Rule 56(f) granting plaintiff additional discovery that is necessary to respond to defendants' motion to compel arbitration, and such other and further relief as to this Court may seem just and proper, including attorney's fees and costs."

10. Annexed hereto as Exhibit 5 is defendants' notice of motion to compel arbitration and stay litigation dated November 2, 1995, and supporting affidavits filed in the District Court.

11. Annexed hereto as Exhibit 6 is the Affidavit of Linda Schaffer in Further Support of Defendant's [sic] Motion to Compel Arbitration and Stay Litigation sworn to June 28, 1996, which is not based on personal knowledge and itself showing, by reliance upon largely illegible and incomprehensible computer entries, about which she knew little or nothing, plaintiff's need of further discovery in the proceedings in the District Court.

12. The importance of the public policy debate on the issues presented by this appeal is indicated by the fact that last Saturday, March 22, 1997, such issues were debated in the 21st Annual Robert F. Wagner, Sr., National Labor Law Moot Court Competition at the United States Supreme Court level at New York Law School, in which the undersigned participated as a Justice.

13. Such important issues of first impression also are being litigated in a number of cases around the country in which the Equal Employment Opportunity Commission has taken the position that such compulsory arbitration agreements should be held to be unenforceable on public policy grounds. See, e.g., Duffield v. Robertson Stephens & Co., No. C-95-0109-EFL (N.D. Cal.) (amicus brief filed by EEOC); Cosgrove v. Shearson Lehman Bros., No. 95-3432 (6th Cir.) (amicus brief filed by EEOC); EEOC v. River Oaks Imaging & Diagnostic, Civ. A. H-95-75 (S.D. Tex.); EEOC v. Midland Food Services, LLC, No. 1:96-MC-107 (N.D. Ohio); Johnson v. Hubbard Broadcasting, Inc., No. 4-96-cv-107 (D. Minn.) (amicus brief filed by EEOC); Pierre Levy, Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights, 26 N.M. L.

REV. 455, 478 n.193 (1996), describing the EEOC's objections to such compulsory arbitration proceedings.

WHEREFORE, the motion to dismiss dated February 28, 1997, should be denied, or in the alternative the petition for a writ of mandamus on behalf of plaintiff-appellant should be granted.

Respectfully submitted,

/s/
Arthur M. Wisehart (AMW 4003)

WISEHART & KOCH
19 W. 44th Street - Suite 412
New York, New York 10036
(212) 730-0044

Attorneys for Plaintiff-Appellant/
Petitioner

Sworn to before me this

1st day of April 1997:

/s/ Joan Lipin
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANTHONY DE MEO 95 Civ.

Plaintiff

-against- COMPLAINT

SMITH BARNEY INC., THE TRAVELERS INC., and TONI ELLIOTT. PLAINTIFF DEMANDS TRIAL BY JURY

Defendants

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Plaintiff, by his attorneys WISEHART & KOCH, for his Complaint against defendants, alleges and states:

Jurisdiction and Venue

1. This Court has subject matter jurisdiction under Section 623 of the Age Discrimination in Employment Act, made applicable by Section 626(c) of said Act, 29 U.S.C.§§ 623, 626(c), 630(b), pursuant to 28 U.S.C. §§ 1331, 1337, and 1343(a)(4) and under the doctrine of supplemental and pendent jurisdiction.

2. Jurisdiction also exists under diversity of citizenship.

3. Plaintiff Anthony DeMeo is a citizen and resident of the State of New Jersey.

4. Defendant Smith Barney Inc. ("Smith Barney") has its principal place of business in, and is a citizen of the State of

New York for diversity of citizenship purposes, and not a citizen of the State of New Jersey.

5. Defendant The Travelers Inc. has its principal place of business in, and is a citizen of the State of New York for diversity of citizenship purposes, and not a citizen of the State of New Jersey.

6. Smith Barney is a subsidiary corporation owned and controlled by The Travelers Inc. The Travelers Inc. aided and abetted the other defendants in the unlawful discriminatory practices alleged herein.

7. Defendant Toni Elliott was and is an Executive Vice President of Smith Barney and a citizen and resident of the State of New York.

8. The amount in controversy exceeds $50,000 exclusive of interest and costs.

9. Venue exists in the Southern District of New York under 28 U.S.C. § 1391(b) and (c) in that the events or omissions giving rise to the claim occurred in the Southern District of New York, and all defendants maintain offices or reside in the Southern District of New York.

The Employment of Plaintiff

10. Plaintiff was employed by a corporate predecessor of defendants in 1968.

11. Plaintiff thereupon entered upon a career with defendants and their predecessors which led to a continuing series of promotions to positions of higher responsibility until he became Senior Vice President of Marketing of Smith Barney.

12. Plaintiff was and is competent and fully qualified to perform the responsibilities of his position.

VIOLATION OF THE AGE DISCRIMINATION LAWS

13. Plaintiff's date of birth is March 4, 1947. He is 48 years old.

14. On or about August 21, 1994, defendants terminated plaintiff.

15. Plaintiff was told of such termination by Toni Elliott, who was plaintiff's supervisor.

16. Such termination was contrary to assurances previously given to, and relied upon by Mr. DeMeo in accepting new assignments that he would not be terminated except for just cause in view of his years of service, experience and outstanding achievements of extraordinary benefit to the company and its predecessors, and constituting additional consideration for his employment agreement.

17. Plaintiff would have been promoted to Executive Vice President in view of his responsibilities, qualifications and achievements but for defendants' invidious discrimination against him as an older employee.

18. Because of plaintiff's age, defendants did not promote him, and took actions to downgrade and humiliate plaintiff within the corporate structure with the purpose and intent of causing or compelling him to leave because of his age.

19. Defendants' purpose and intent were to discriminate against plaintiff and other older employees in favor of younger employees in their 20s and 30s to whom plaintiff's functions

were assigned, but who lacked the ability and experience to perform such functions as well as plaintiff.

20. Said actions were in furtherance of a scheme instigated by defendants to replace plaintiff with younger, relatively inexperienced personnel.

21. Three other employees were terminated on the same day as plaintiff. Each employee was over 50 years of age and had over 25 years employment with the firm.

22. The plan and purpose of defendants were to eliminate older executives and to replace them with younger personnel.

23. Plaintiff at all times performed his duties in a devoted and trustworthy manner which exceeded the requirements of his position.

24. Plaintiff's qualifications equaled or exceeded those required for his position.

25. Plaintiff was at the peak of his professional proficiency at the time of his termination.

26. Plaintiff's qualifications and value significantly exceed those of a number of the other Smith Barney employees as represented particularly by the younger, more recent additions to the staff who were not terminated, and who were assigned plaintiff's functions and promoted.

27. Plaintiff received repeated commendations for his performance throughout his employment. His qualifications substantially exceeded those of Toni Elliott, although she was his supervisor, and those of Jay Mendelbaum, her supervisor, although he was in his early 30's with little experience in the

company or industry, or that was relevant to his position.

28. Plaintiff's qualifications significantly exceed those of a number of much younger employees who were not terminated. Jay Mendelbaum, in his 30's was moved into plaintiff's office while plaintiff was shunted off into another location as a way of humiliating him in the eyes of the rest of the staff. Following plaintiff's termination, Mendelbaum was put in charge of Marketing, about which he knew very little in comparison with plaintiff.

29. Defendants' acts as alleged above are caused by defendants' intentional age discrimination against plaintiff, and also by defendants' purpose and intent to retaliate against plaintiff because of his objections concerning the discriminatory treatment of other older employees, especially his own secretary.

30. Plaintiff is well known as a leading senior executive in the securities industry. As defendants knew and intended, knowledge of plaintiff's humiliating termination has created a stigma that has permanently and irreparably injured his professional reputation in the securities industry.

31. Defendants' acts as alleged above constitute lawful age discrimination and retaliation causing injury to plaintiff.

32. Defendants have injured and will continue to cause injury to plaintiff's professional reputation in the securities industry (a) by referring to plaintiff and other older employees as "dinosaurs" whose knowledge, abilities and skills are outmoded, old fashioned or obsolete, (b) by falsely stating that plaintiff has a "lousy work ethic," and (c) by falsely stating that plaintiff's work performance was inadequate or deficient.

33. Defendants have caused further injury to plaintiff

by falsely and unfairly publishing, discrediting and impugning his performance as an employee to others in the securities industry and community, and intend to continue to do so in retaliation for plaintiff's objections to their discriminatory and unlawful conduct.

34. Defendants follow a pattern or practice of discriminating against older personnel by creating a hostile work environment by the adverse and disparate treatment of them compared with their treatment of younger employees.

35. Because of the pervasiveness of age discrimination in the securities industry, and at Smith Barney, it is impossible for older employees to obtain comparable employment either from within the company, or in another securities firm, whereas younger applicants and employees of lesser qualifications are able to obtain positions at the same time that older employees qualified for those positions are being terminated.

36. Defendants' actions as alleged above were in furtherance of a continuing strategy of harassment and abusive, intolerable and discriminatory treatment by defendants intended to force plaintiff and other qualified older employees out of their positions, to victimize them by reducing their relative compensation and by adversely altering their other terms and conditions of employment, so as to humiliate and demean them in their trade or profession as executives in the company and in the securities industry.

37. Said actions constitute invidious acts of age discrimination by defendants against plaintiff and other older employees as a class.

38. Defendants' acts of age discrimination against plaintiff were wanton, willful and intentional, and in reckless disregard for the rights of plaintiff and others similarly situated.

39. Plaintiff duly filed a discrimination charge with the United States Equal Employment Opportunity Commission on March 22, 1995, and requested that agency to file said charge with the New York State Division of Human Rights.

40. It is anticipated that the New York state Division of Human Rights will dismiss said charge under the New York Human Rights Law on grounds of administrative convenience upon the commencement of this action in accordance with its procedure and practice.

41. Plaintiff has duly complied with the pre-filing requirements under the Human Rights Law of the City of New York.

42. As a result of defendants' unlawful conduct plaintiff has suffered a loss of compensation for his worklife expectancy in the amount of approximately $4,600,000 or such other and greater amount as shall be proved at trial plus an additional amount of $2,300,000 for lost promotions to which plaintiff would be entitled but for age discrimination.

43. Defendants' discriminatory acts were in willful violation of the Age Discrimination in Employment Act, and liquidated or double damages are requested.

44. In addition plaintiff requests compensatory damages as set forth below.

45. The injury to plaintiff's reputation and standing and injury to his good will in plaintiff's profession caused by defendants' acts is in the amount of $5,000,000.

46. Defendants' acts have caused personal injury to plaintiff, impairment of his health, pain and suffering, mental and physical anguish, emotional distress, and humiliation as a

professional in advanced computerized systems for portfolio analysis and financial planning, and as a marketing expert and manager, and additional damages therefor in the amount of $5,000,000 are requested.

47. The value to defendants of the new and improved MIS programs utilizing advanced computer technology that defendants have misappropriated from plaintiff by his termination represents a substantial business advantage, and plaintiff requests $12,000,000 in compensatory damages for the unjust enrichment of defendants caused by their unlawful acts intended by defendants to exploit and unjustly enrich themselves by appropriating the inventions, skills and knowledge of plaintiff while they maneuvered him into a position to perpetrate and implement their unlawful discriminatory purpose, and were contrary to the false representations and assurances previously made by defendants to plaintiff at the time he was requested to perform other assignments.

48. Said discriminatory acts of defendants also are violative of the Human Rights Law of the City of New York, N.Y.C. Admin. Code Section 8-107.

49. Plaintiff is a person aggrieved by unlawful discriminatory practices perpetrated by defendants and entitled to commence a civil action pursuant to Section 8-502 of the amended Human Rights Law of the City of New York for the judicial remedies provided thereunder.

50. Defendants' unlawful acts causing injury to plaintiff were willful and wanton, committed with personal malice and hostile animus toward plaintiff and other older employees considered by defendants to be non-productive "dinosaurs," in deliberate violation of law and public policy, and/or reckless disregard for the rights of plaintiff and other older personnel.

51. Punitive or exemplary damages are requested in the amount of $15,000,000, or such greater amount as shall be required, in light of defendants' income and assets, and the value of the benefits that plaintiff has conferred upon defendants without receiving recognition or additional compensation therefore, to deter each defendant, and those who may be induced to collude and conspire with them, from engaging in such reprehensible conduct in the future.

52. Plaintiff also requests compensatory damages as provided in Section 297(9) of the New York Human Rights Law for the injuries resulting from said discriminatory acts, including damages for loss of earnings and benefits for his work life expectancy, injury to his professional standing, loss of good will, personal injury and impairment of health, and pain and suffering, as set forth above.

WHEREFORE, judgment against the defendants, jointly and severally, providing the following relief is requested on behalf of plaintiff:

(a) Damages of $6,900,000 for lost earnings, or such additional amount as shall be proved at trial, and prejudgment interest thereon;

(b) The doubling of the above amount as liquidated damages for defendants' willful discriminatory acts in violation of the Age Discrimination in Employment Act;

(c) Damages for personal injury to plaintiff including impairment of health, pain and suffering, mental and physical anguish, emotional distress, and humiliation in the amount of $5,000,000;

(d) Damages for injury to plaintiff's reputation and standing and injury to his good will in the amount of $5,000,000;

(e) Damages in the amount of $12,000,000 for the unjust enrichment of defendants by the value of advanced MIS programs developed by plaintiff and misappropriated by defendants;

(f) Punitive damages in the amount of $15,000,000, or such additional amount as shall be required, in light of defendants income and assets, to deter them from engaging in such reprehensible conduct in the future;

(g) Together with prejudgment interest, and reasonable allowances for plaintiff's attorney's fees, costs and litigation expenses, and such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
August 1, 1995

WISEHART & KOCH

/s/_____
Arthur M. Wisehart (AMW 4003)

19 West 43rd Street
Suite 412
New York, New York 10036
(212) 730-0044
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ANTHONY DE MEO — 95 Civ. 5791 (KMW)

Plaintiff

-against- — AFFIDAVIT OF ANTHONY DE MEO

SMITH BARNEY INC.,
THE TRAVELERS INC.,
and TONI ELLIOTT.

Defendants

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ANTHONY DE MEO, being duly sworn, deposes and says:

1. I am the plaintiff in the above entitled action.

2. This affidavit is respectfully submitted in opposition to defendants' motion to compel arbitration.

3. As shown below, the purported Form RE-1 relied on by defendants is not a written agreement that applies to the subject matter of this litigation. Further, the purported Form RE-1 is without force and effect, and did not constitute a knowing and voluntary waiver of my rights and remedies to be determined by a Federal Court and jury, and the granting of defendants' motion to compel arbitration will cause me irreparable injury.

A. THE PURPORTED FORM RE-1 IS WITHOUT FORCE AND EFFECT

4. I began my career in the securities industry with Hayden, Stone, Inc. in 1966.

5. In 1972, in preparation for the position of Administrative Manager of a Hayden, Stone office, I was required to take certain examinations and received preparation in the form of a cram course for that purpose conducted under the direction of Leo Fleur for a four-week period.

6. Mr. Fleur stated to me that, during the four-week period, "everything is meant to get you through the exam; none of this will have any practical application."

7. Such statements by Mr. Fleur also referred to any documents that I was required to sign.

8. The examinations that I took following the preparatory course solely concerned practices in the trading of securities and practices to be followed in dealing with customers in the process.

9. I have no recollection of signing the Form RE-1 a copy of which is annexed hereto as Exhibit A. I have requested that the original document be produced for my examination but it has not been.

10. The Form RE-1 refers to my position as Administrative Manager of CBWL-Hayden, Stone,Inc. However, registration was not required for that position.

11. At no time have I been required to be a registered representative of the NYSE.

12. Further, it is my understanding that it is the practice of the NYSE to notify applicants that they have been approved of for registration after the process has been completed.

13. I have never been so notified, and in fact, the documents produced be the NYSE in response to my discovery requests in this litigation from my file do not indicate that I ever was so approved.

14. The application in the Form RE-1 therefore was never completed and it never became applicable to me.

15. Moreover, since 1972, my employment has changed a minimum of seven times, and my job responsibilities changed a minimum of nine times as indicated in Exhibit B annexed hereto.

16. My successors and predecessors in the management positions I held after leaving CBWL-Hayden, Stone were not required to be registered.

17. Rolf Wetjen, my immediate successor to the position of the Director of General Services, was not required to be registered. Bonnie Brogdan, the current Director of General Services at Lehman Brothers is not registered and there is no requirement that she be registered.

18. My successor as Director of Marketing, Jay Mandelbaum's job requirements never included duties and responsibilities that necessitated registration. Mandelbaum joined Smith Barney from the consulting firm McKinsey & Co. where he had no background in the brokerage industry and was not required to be registered in his former employment.

19. The Form RE-1 annexed hereto as Exhibit A was

used for the limited purpose of my taking certain examinations administered by the New York Stock Exchange ("NYSE").

20. I do not recall ever having been told that the registration or application process had been completed.

21. On the contrary I was specifically told at the time by Anthony Fedele, my immediate supervisor, that I would not be required to become a Registered Representative.

22. This is corroborated by a letter dated October 23, 1972, from the NYSE to Lester DeMott of Hayden Stone, Inc. which refers to the purported application and states that the NYSE was "closing our files" on my application. (Exhibit C annexed hereto.)

23. The letter further states that at some later date the NYSE "would be happy to reopen the file and continue processing the application" if a request should be made.

24. No such request was ever made to my knowledge.

25. The Form RE-1, annexed hereto as Exhibit A, states specifically in paragnph 31 that subparagraph (j) thereof would become applicabe as an agreement only "in consideration of the Nev York Stock Exchanges, Inc.'s approving this application. . . ."

26. As shown by is file produced in discovery herein, the NYSE never approved the application. Accordingly, paragraph 31 never becameeffective, and does not constitute an agreement to arbitrate by ne.

B. THE PURPORTED FORM RE-1 IS NOT A WRITTEN AGREEMENT THAT APPLIES TO THE SUBJECT MATTER OF THIS LITIGATION

27. I unequivocally deny that the Form RE-1 application purportedly signed on June 20, 1972, is a written agreement for the arbitration of the age discrimination claims that I have asserted in this litigation.

28. Paragraph 31(j) is limited to "controversy."

29. I did not at any time ever agree to arbitrate "claims" such as those that are involved in this litigation.

30. I did not even know that there were such things as age discrimination claims in 1972.

31. My understanding of the "controversy" referred to in paragraph 31(j) is that it is limited to matters involving practices with respect to the trading of securities for customers.

32. However, in all of my years in securities field, I never traded any securities for customers, and I did not ever receive any commissions for doing so.

33. My understanding that paragraph 31(j) is limited to controversies involving the trading of securities and related matters is supported by the context in which it is found. It is located between paragraphs 31(i) and 31(k).

34. Paragraph 31(i) states that an applicant agrees to notify the member organization if they become the subject of any securities investigation or disciplinary action, litigation concerning securities industry, allegations inconsistent with equitable principles of trade as well as other such actions

concerning the practices of the Exchange and securities and trade industry.

35. Paragraph 31(k) states that the applicant agrees to submit to investigative procedures up to 90 days after notice of termination concerning any matters that during the time of employment the applicant did not conform with the NYSE Constitution and Rules or the practices of the Exchange and would accept any disciplinary actions or penalties if warranted.

36. Form RE-1, paragraph 31(j), is limited to the arbitration of "controversies" and does not in any way state that "claims" relating to age discrimination are subject to arbitration. Nor does it state that any "claim" in general is subject to arbitration.

C. THE PURPORTED FORM RE-1 HAS EXPIRED

37. During the process of discovery, the National Association of Securities Dealers, Inc., produced the Record from its Central Registration Depository ("CRD") pertaining to me that is set forth in Exhibit D annexed hereto.

38. The entries in the CRD indicate that the purported Form RE-1 that is relied upon by defendants therefore was superseded by subsequent events, and no longer is applicable.

39. In particular, I call the Court's attention to the following "terminations" that are noted on the CRD:

9/07/94
7/31/93
11/22/77
11/17/76
11/08/74
10/26/73

40. No Form RE-1 registration for me is listed on the CRD. This corroborates my statement above that action with reference to my registration was never completed by the NYSE.

41. Use of the Form RE-1 was discontinued by the NYSE in the period between 1976 and 1978 as shown in Exhibits E and F annexed hereto. It was superseded by the Form U-4 used by the National Association of Securities Dealers.

42. However, I never signed the Form U-4, nor did I authorize anyone to do so on my behalf.

43. Further, I was never advised that I was registered thereunder.

44. None of the information on the CRD provided by the National Association of Securities Dealers was provided to me, nor did I authorize any of the actions taken in the entries listed thereon.

45. We requested any documents relating to such computerized information listed on the CRD be produced by defendants as shown in Exhibit G annexed hereto.

46. However, defendants have produced no such documents. Moreover, defendants have represented that there are no other such documents in a letter dated March 18, 1996 (Exhibit H annexed hereto).

47. I am informed that the National Association of Securities Dealers has no documents to support such entries (Exhibit I annexed hereto).

48. Thus, if there ever were such documents, they have been destroyed by defendants or their predecessors.

49. The computer entries in the CRD deal with matters and purported actions that I never knew of, was never informed about, and never authorized or approved. In addition, the entries computerized on the CRD include very serious mistakes concerning my employment history in the information entered by some unknown person or persons as shown below:

a. The CRD lists my employment with two separate companies in overlapping time periods: Shearson Lehman Hutton Inc. from 11/22/77 to 7/31/90 and then Shearson Lehman Brothers Inc. from 11/22/77 to 7/31/90.

b. The entries for both Shearson Lehman Hutton Inc. and Shearson Lehman Brothers Inc. are incorrect as evidenced by my resume annexed hereto as Exhibit B. As indicated on my resume, my employment history during the years 1976 to 1993 is as follows:

Jan 1976 - Dec 1979: Shearson Hayden Stone Inc.;
Dec 1979 - June 1981: Shearson Loeb Rhoades Inc.;
June 1981 - April 1984: Shearson American Express Inc.;
April 1984 - May 1985: Shearson Lehman American Express;
May 1985 - May 1988: Shearson Lehman Brothers Inc.;

May 1988 - June 1990:
Shearson Lehman Hutton, Inc.;
June 1990 - July 1993:
Shearson Lehman Brothers Inc.

50. Further, the CRD indicates that at some point there were multiple Form U-4 "conversion" filings. Conversion filings are listed as follows:

10/16/93
10/20/92
3/04/91
4/27/85
8/15/84
6/13/81

51. I never agreed to or authorized any such conversion filing and I never signed a Form U-4. Nor did the CRD, NASD or NYSE notify me through the issuance of statements, or any other means, that they were making such filings. Thus it was impossible for me to consent to whatever the forms stated, and I did not.

52. In addition, such the entry of such "conversion" filings shows that the RE-1 was not regarded by defendants as having any force and effect.

53. Since I did not ever sign a Form U-4, I have never consented to the terms of such Form.

54. I unequivocally deny that I ever entered into a written agreement for arbitration with respect to the age discrimination claims that are the subject of this lawsuit.

55. I unequivocally deny that the Form RE-1 application I purportedly signed on June 20, 1972 is a written

agreement for the arbitration of the age discrimination claims that I have in this case.

56. I never authorized any annual registration fee to be paid on my behalf, nor was I ever asked for such authority.

57. The Form RE-1 is not applicable to defendants The Travelers Inc. and Toni Elliott, neither of whom is a member, organization, affiliate or subsidiary of Smith Barney Inc. according to the NYSE Constitution and Rules.

58. The Travelers Inc. is a corporation that primarily deals in insurance and according to the NYSE Constitution and Rules is not a member or member organization nor are they a subsidiary or affiliate thereof.

59. Toni Elliott was not required to be a registered representative given the nature of her duties. Toni Elliott knew little of anything about being a stockbroker and did not have any trading responsibilities in her position.

D. THE FORM RE-1 WAS NOT A KNOWING AND VOLUNTARY WAIVER OF MY RIGHTS TO A JUDICIAL REMEDY TO BE DETERMINED BY A FEDERAL COURT AND JURY

60. There was never any knowing or voluntary agreement by me to arbitrate the dispute that underlies the claims pleaded in my complaint in this action (Exhibit J annexed hereto).

61. I never had any understanding that such disputes would be arbitrated, nor would I waive my jury trial rights to any such arbitration under the rules of the New York Stock Exchange because the arbitrators used are biased in favor of management of firms in the securities industry, and are unable

to provide the same remedies as may be obtained in judicial proceedings.

62. In fact I specifically declined to sign the Settlement and General Release dated August 24, 1994, containing an arbitration clause that was requested by Smith Barney in connection with my termination (Exhibit K annexed hereto).

63. The Form RE-1 document dated June 20, 1972, that is annexed to the affidavit of Eugene V. Clark, Esq., Senior Vice President and Associate General Counsel of defendant Smith Barney Inc., to the best of my knowledge, information and belief, is not contained within or a part of my personnel file or employment agreement with Smith Barney Inc., but is a document that never became effective and furthermore has expired or has been canceled, superseded, revoked or lapsed due to subsequent events.

64. The document annexed to the Clark affidavit was destroyed, revoked or lapsed, or became ineffective long before my employment by Smith Barney.

65. Upon my request, when my personnel file at Smith Barney was given to me approximately six months ago for my examination, and document was not part of the file.

66. Smith Barney is not a successor in interest with regard to my employment at CBWL-Hayden, Stone.

67. Moreover, there was never any understanding or agreement relating to arbitration that applies to the position I held with Smith Barney prior to my termination.

68. Further, said document was never required for or had any application to the duties I performed at Smith Barney.

69. The terms of the abandoned and expired form have no application to my performance of executive-level management responsibilities for other firms. Smith Barney is not a party to the abandoned Form, nor is it a successor in interest of CBWL-Hayden, Stone Inc. Defendants have no rights under the document for the further reason that there is no privity of contract. Based upon the information available to me, the business that was CBWL-Hayden, Stone Inc. is now part of the assets of Lehman Brothers, Inc., which is now an independent public company without any connection to Smith Barney, Inc. Thus Smith Barney is without standing to assert a claim under said document.

70. Further, there is no consideration for the application of said document or registration thereunder to my employment at Smith Barney as it was not required as a condition of my employment at that firm. It therefore is null and void, and without force and effect.

E. NO WAIVER OF RIGHTS OCCURRED

71. I did not at any time have a "knowing and voluntary agreement" to arbitrate a dispute involving such conduct of defendants as was both unlawful and contrary to strong public policy expressed in Federal, State and New York City Age Discrimination and Human Rights Laws, on matters involving personnel and practices that were in no way involved with my employment at CBWL-Hayden, Stone Inc.

72. Defendants' motion should be denied as an unlawful attempt to impose compulsory arbitration upon me in violation of my statutory and constitutional jury trial and due process rights.

73. The Form RE-1 relied on by defendants also has

no application to defendants The Travelers Inc. and Toni Elliott, neither of whom signed it or is either a member of the New York Stock Exchange nor is either an organization, affiliate or subsidiary of Smith Barney in its capacity as a member.

74. Arbitration of my claims involved in this litigation would violate my jury trial and due process rights under Federal and State laws, and cause irreparable injury to me.

75. The Form RE-1 that was purportedly signed 22 years before I was terminated stated in provision 30(d) (Exhibit A attached hereto) that I had read the NYSE Constitution and Rules and agreed to abide by them and their subsequent amendments and provisions. Paragraph 30(j), the clause discussing arbitration, purportedly states that I will abide by the arbitration procedures in the NYSE Constitution and Rules. Such a clause amounts to a coercive tactic by the NYSE to myself as well as all others similarly situated intended to obtain under false pretenses our purported consent to a provision that the NYSE makes it impossible to agree with because of the complexity and multitude of its rules and regulations.

76. The NYSE Constitution and Rules as evidenced by the representative index, Exhibit L attached hereto, are extremely voluminous, detailed and complex. Thus, they are impossible to fully comprehend without months, if not a year, of continuous study.

77. However, the bureaucracy of the NYSE makes such study impossible. According to the NYSE, the only set of volumes available to the NYSE are the ones located at the General Counsel's office, even though thousands registered representative applications are filled out every year. The NYSE requires that the RE-1 and U-4 are to be filled out as soon as possible so that the NYSE's investigation or examination of the

applicant is completed even before the applicant completes his training a period that itself may take months.

78. Thus, the NYSE deliberately and consciously demands the impossible, that an applicant fully comprehend a large volume containing highly technical language in a very limited amount of time as found in books and records that are not available, and be coerced into purporting to agree with conditions that by their nature are impossible on pain of otherwise being subjected to denial of a livelihood.

79. The NYSE demands the further impossibility that applicants agree to any and all amendments that may be made at any time in the future, sight unseen.

80. The only possible means that I would have even to become aware of such amendments would be to take it upon myself and sift through the Constitution and Rules every year and compare them to the last edition for changes. The information memos sent out by the NYSE concerning amendments are to the members and member organizations only, which I am not.

81. It is further impossible for applicants to be aware of every provision in the Constitution and Rules since they would be unaware of amendments that took place after the current NYSE Constitution and Rules was published and before the publication of the next edition containing the new amendments.

82. Thus, I unequivocally did not voluntarily or knowingly enter into any agreement, let alone a written agreement to arbitrate a claim based on a discriminatory reduction in force by another employer occurring more than 20 years in the future.

83. I am informed that the Form RE-1 amounts to a contract of adhesion, I am advised that all ambiguities therein would be required to be construed in my favor.

84. Furthermore, assuming that one is able to read and comprehend the Constitution and Rules in the fashion required by the NYSE, then I still would not be forced to arbitrate my claim because the respective arbitration clauses of the RE-1 and the Constitution at the time of the RE-1 contradict one another and thus completely defied either understanding or agreement.

85. At the date of the purported Form RE-1, the NYSE Constitution stated that any controversy between a member and a non-member would be arbitrated only at the instance of any such non-member, which I am according to the NYSE Constitution and Rules. (Exhibit M annexed hereto). Thus, members such as Smith Barney have no standing to initiate arbitration thereunder as it here seeks to do.

F. ADDITIONAL DISCOVERY IS REQUIRED IN THE INTEREST OF JUSTICE

86. The denial of additional discovery because the New York Stock Exchange ("NYSE") asserted that the motion to compel arbitration pertains only to "a very small subset" of the twenty-seven volumes of the Constitution and Rules of the NYSE and that those sections are "readily identifiable from the index in each edition" is incorrect.

87. The motion to compel arbitration pertains to much more than "a very small subset" of these volumes. As represented by the sample index Exhibit L attached hereto these volumes contain a large quantity of information and the information we seek within these large volumes is anything but "a very small subset." To illustrate our frustration in trying to examine the portions of the volumes we believe pertain to the

motion to compel arbitration reference is made to the sections on "arbitration," "fees," "forms," "employees," "member organizations," "registration," and "representatives" among others appear to be relevant.

88. In addition, much of the information we are seeking is not "readily identifiable from the index of each edition." There is absolutely no reference in the indices to "Form RE-1," "Form U-4," "affiliates," "fees for officers," "lapse of registration" and a great deal of other matters that are integral to opposing the motion to compel arbitration. Some of these key points have thus only become discoverable through the difficult and lengthy task of sifting through the cumbersome volumes themselves while other key points have remained uncovered. Added to this difficulty is that the indices do not remain consistent throughout the years.

89. Moreover, once one does find a section that is relevant, it is necessary to examine the preceding and subsequent editions to see what was amended. The Constitution and Rules note when a particular provision was amended but in no way indicates what in the provision was amended. Therefore, one must read a provision before it was amended and compare that to a provision after it was amended. There may be as many as eleven amendments to a single provision as noted in Rule 345.13 Exhibit N annexed hereto.

90. These amendments vary on the size of the provision being altered. Certain provisions have one key word amended as evidenced in Article VIII Sec. 1 ¶ 1351 in Exhibits M and O annexed hereto while other provisions have numerous paragraphs being added, deleted and altered. Some provisions have even been altered without mention of when or what was being amended at all, such as the abandonment of Form RE-1 and its replacement by the inconsistent provisions of Form U-4, making discovery of such changes an impossibility.

91. The NYSE has stated that the only volumes it has date back only to May, 1972, and it is thus impossible to find out what relevant portions of the Constitution and Rules stated prior to May, 1972, or the explanation given when the Form RE-1 was initially adopted.

G. THE GRANTING OF DEFENDANTS' MOTION TO COMPEL ARBITRATION WOULD CAUSE IRREPARABLE INJURY

92. I am advised that the Federal Arbitration Act was adopted in 1925, long before the Age Discrimination in Employment Act of 1967 was even thought about.

93. The purpose of the Federal Arbitration Act was to protect persons who could not afford the costs of litigation and lawyers by providing a fast, inexpensive remedy for run of the mill business-type disputes involving settled and understood trade practices.

94. However, the securities industry has transmogrified arbitration from a procedure available for a small person without resources into a lethal weapon administered by a biased entity, the NYSE, that is used by huge securities firms to retaliate against and obstruct the ability of former employees who raise substantial questions with regard to their rights to be protected from age discrimination and civil rights violations to obtain a fair determination of their rights and remedies.

95. In my case, the purported Form RE-1 was required as a part of my contract of employment with another company many years before my employment by Smith Barney and had no application at all with respect to the duties as I performed at Smith Barney.

96. No registration with the New York Stock Exchange is required for the management positions such as I held at Smith Barney and predecessor firms.

H. THE ARBITRATION PROCEDURE HAS BEEN DELIBERATELY USED BY THE SECURITIES INDUSTRY TO PERPETUATE AGE DISCRIMINATION

97. The fact that the arbitration procedure has been used by the securities industry in order to obstruct the application of the laws against age discrimination and civil rights violations is indicated by the continuing widespread existence of such unlawful practices in the securities industry, to my own personal knowledge.

98. It is commonplace in the securities industry to refer to persons over age 45 as "dinosaurs," as an indication of the bias that exists against such persons, and the belief that they are obsolete and unable to be productive members of the workforce in that industry despite their years of training and experience.

99. The pattern and practice of age discrimination persists in the securities industry despite the fact that such activities have now been declared to be unlawful for many years largely because the arbitration procedure has been used by the securities firms to obstruct and largely nullify the enforcement procedures and remedies available in Federal Court actions made available by law to victims of such misconduct in the securities industry.

100. The existence of the pattern or practice of age discrimination in the securities industry is based upon my direct knowledge and observations as an officer or top official in a number of large securities firms over the past twenty or more years.

101. Smith Barney has exemplified this pattern or practice and the number of executives not forced to leave on one pretext or another after reaching the age range of 45-50 in that firm is very small.

102. In fact one of my former supervisors, Stan Witkowski, told me that Smith Barney feels that it can get away with treating older employees any way it wanted to because, under the law of averages, few would ever be able to pursue their claims against the Company.

103. Smith Barney is particularly biased against the older employees of Shearson such as myself because, a year after Smith Barney's acquisition of Shearson, it considered the older former Shearson people to be expendable as "dinosaurs."

104. Five of us former Shearson people, all over age 45, were told that we were being terminated on the same day, and their functions filled with much younger and less experienced persons.

105. The fact that the arbitration procedure has caused great injury to the rights of persons with age discrimination and civil rights claims has been a subject of widespread comment by experts familiar with both the litigation of such claims, as stated in the Comments of Judith P. Vladeck, Esq., "New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry," 63 Ford.L.Rev. 1625-1630 (1995) (Exhibit P annexed hereto), and also the statements of Janice Goodman, Esq., entitled "Mandatory Arbitration is Not an Alternative for Employees," presented at the Annual Meeting of the New York State Bar Association, Labor and Employment Law Section, January 26, 1996 (Exhibit Q annexed hereto), statements of which the Court is asked to take judicial notice.

106. Thus the arbitration procedure that has permitted

such a perversion of the purposes of the Age Discrimination in Employment Act to flourish at Smith Barney would cause me irreparable injury and facilitate the destruction of my career. Retaliatory blackball practice exists in the securities industry concerning the future employment of top officers at the Senior Vice President level such as myself who are known to have been terminated by a major firm, information that has already been published to the industry with an intent to injure by Smith Barney in the Form U-5 that has been filed with respect to me (Exhibit R annexed hereto), and assert age discrimination claims.

I. DEFENDANTS' MOTION WOULD VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

107. The granting of defendants' motion would cause compulsory arbitration of my age discrimination claims in violation of my constitutional rights.

108. Mandatory arbitration of employment claims in the securities industry serves no public function and provides no public benefit. Rather, mandating arbitration of employment discrimination claims is intended primarily to limit the liability of securities industry employers by allowing them to choose an employer-friendly forum where their success is more likely and where awards tend to be smaller than in civil courts.

109. Mandatory arbitration of employment discrimination claims deprives plaintiffs in the securities industry of their procedural and substantive due process rights that otherwise would be protected in the civil courts, including the following:

(a) Securities industry discrimination plaintiffs are deprived of their rights to a jury trial under the Seventh Amendment and their

rights to a jury trial under the Age Discrimination in Employment Act.

(b) Securities industry discrimination plaintiffs are deprived of their rights to have Article III Courts, comprised of appointed judges with lifetime tenure and salary protection, adjudicate their claims of discrimination.

(c) Although securities industry arbitration rules on their face permit arbitrators to issue written findings of fact and conclusions of law, upon information and belief, the industry arbitration practice actively discourages arbitrators from issuing such written findings and conclusions in order to render any meaningful judicial review of those decisions difficult or impossible, thus denying plaintiffs any meaningful right to appeal arbitration decisions.

(d) Upon information and belief, the securities industry arbitration procedures do not provide for the selection of truly neutral arbitrators. Rather, arbitrators are selected by units that are governed and controlled by the representatives of the employers in the securities industry including defendant Smith Barney.

(e) Historically, the demographic characteristics of the arbitration panels do not represent the community of arbitrators qualified to decide employment disputes, but are overwhelmingly comprised of persons having positions or beneficial relationships in the

securities industry, or further appointments of and compensation as arbitrators. These panels, on the whole, likely will be more hostile to discrimination claims brought by terminated employees than demographically representative panels. Further, the securities industry agencies use internal referral procedures to select arbitrators, keep secret the identities of the pools of the arbitrators who may hear disputes, and employ secret and subjective criteria in determining whom to recruit for those pools, all of which serve to perpetuate the imbalance of arbitration panels. These selection devices also serve to deprive plaintiffs of their equal protection rights to be free from discrimination in the selection of the finders of fact.

(f) Securities industry discrimination plaintiffs are deprived of their rights to have a panel with knowledge of age discrimination laws hear their claims, and do not provide adequate training in the area of employment discrimination to their arbitrators.

(g) Securities industry arbitrators are believed to be instructed in training manuals that they are not required to follow "case precedent or statutory law," which includes the complex legal framework of age discrimination laws including concepts such as disparate impact and disparate treatment, mixed motive factors, hostile working environment, shifting burdens of proof, after-acquired evidence, and fee-shifting provisions, to name only a few. Moreover, arbitrators' decisions are not judicially reviewable for statutory error.

(h) Historically, securities industry arbitration panels have been reluctant to find employers guilty of employment discrimination. Even where arbitration panels find unlawful conduct, they often award inadequate damages to the plaintiffs. Furthermore, upon information and belief, the securities industry arbitrators are believed regularly to engage in ex parte communications with others about the nature, subject and amounts of their decisions.

(i) Upon information and belief, the securities industry often imposes onerous and exorbitant "forum fees" on securities industry discrimination plaintiffs, even those who prevail, for pursuing their claims and often fail to award attorneys' fees as provided for under the Age Discrimination in Employment Act.

110. The Fifth Amendment to the United States Constitution, applicable to actions of the federal government, guarantees due process of law to the plaintiffs and all others similarly situated.

111. The system of mandating arbitration of employment discrimination claims constitutes action of the federal government because of: (1) the plenary regulation of the exchanges by the Federal Securities Acts; (2) the extensive delegation of regulatory power by the SEC to the exchanges as self-regulatory organizations; (3) the encouragement given by the SEC to the exchanges to require employees in the securities industry to arbitrate their employment disputes with their employers; (4) the permission granted by the SEC to the exchanges to modify their rules and regulations to require arbitration of all employment disputes; (5) the approval given by the SEC to the specific arbitration procedure utilized by the

exchanges; (6) the exercise of the judicial power by arbitrators in hearing and deciding statutory and common law disputes in the securities industry, which power has traditionally been an exclusive function of federal and state courts, (7) the action of the courts in enforcing coercive contracts of adhesion by compelling arbitration of employment disputes in the securities industry against the will of securities industry employees; and (8) the action of the courts in confirming arbitration awards in employment disputes where the dispute was arbitrated against the will of securities industry employees.

112. The compelling mandatory arbitration in the present case is unconstitutional because it would deprive me and all others similarly situated of our rights to a jury trial under the Seventh Amendment and under the Age Discrimination in Employment Act.

113. Requiring employees to waive their constitutional and statutory rights to a jury trial as a condition of employment imposes an unconstitutional condition on employment, in violation of the due process guarantees of the Fifth Amendment to the United States Constitution, and violates the Age Discrimination in Employment Act.

114. Compelling mandatory arbitration in the present action would be unconstitutional because it would deprive me and all other similarly situation of our right to adjudicate our claims before an Article III court under the Constitution and the Age Discrimination in Employment Act.

115. Requiring employees to agree to waive their constitutional rights to have their claims adjudicated by an Article III court as a condition of employment imposes an unconstitutional condition on employment, in violation of the due process guarantees of the Fifth Amendment, and violates the Age Discrimination in Employment Act.

116. Compelling mandatory arbitration in the present action would be unconstitutional because the procedures employed under the rules of the securities industry agencies, as described above, would deprive me and all others similarly situation of our rights to due process under the Fifth Amendment, including but not limited to our right to have the civil rights and employment laws enforced as written.

117. Requiring employees to waive their constitutional rights to due process, including but not limited to their rights to have the civil rights and employment laws enforced as written, as a condition of employment imposes an unconstitutional condition on employment, in violation of due process guarantees of the Fifth Amendment.

118. Compelling mandatory arbitration in the present case would be unlawful because the arbitration procedures employed by the securities industry agencies operate as a de facto forfeiture of statutorily-mandated rights or benefits afforded by the Age Discrimination in Employment Act and other employment laws, including, but not limited to, the right to a jury trial, and the right to attorneys' fees, in violation of the due process guarantees of the Fifth Amendment.

119. Requiring employees to agree to forfeit their important statutorily-mandated rights or benefits afforded by the Age Discrimination in Employment Act and other employment laws, including but not limited to the right to a jury trial, punitive damages, and attorneys' fees, as a condition of employment imposes an unconstitutional condition on employment, in violation of the due process guarantees of the Fifth Amendment.

WHEREFORE, the issues raised in the foregoing affidavit should be set down for hearing and determination before a jury pursuant to the requirements of the Federal Arbitration Act, 9 U.S.C. § 4, and the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f). Additional discovery needed for the purpose of that hearing should be granted as requested above.

Respectfully submitted,

/s/ Anthony De Meo
Anthony De Meo

Sworn before me this

10th day of June 1996:

/s/ Heather R. Boshak
Notary Public

RE-1. APPLICATION FOR APPROVAL OF EMPLOYMENT
NEW YORK STOCK EXCHANGE, INC.

DEPARTMENT OF MEMBER FIRMS 26610

This page to be filled in by applicant employer organization
PLEASE TYPEWRITE INFORMATION

If application is incomplete it may be returned.

1. DeMeo Anthony John
   Last name First name Middle

2. 9/11/70
   Starting date

3. CWBL-Hayden, Stone, Inc.
   To be employed by
4. 17 Battery Place North
   Location of Office
5. (a) Administrative Manager
   Title or position
   (b) Administrative
   Nature of primary duties
6. Type of approval Requested
   (a) Registered Representative-Rule 345(a)
   Full Registration X Limited Registration
   (b) Supervisory Person-Rule 342(d) X
   (c) Supervisory Analyst-Rule 344
   (d) Corporate Officer (Not an Allied Member or Approved Person)
   (Check a, b, or c also if applicable)
7. Compensation
   (a) Salary $_____per_____
   (b) Commission on listed_%, unlisted_%, mutual funds

(c) Other. If candidate is to participate in profits of the employer organization or any office, department of affiliate or subsidiary corporation, give details here_____

_____

Complete and accurate answers to the questions listed on this application form will eliminate delay and assist the Exchange in acting expeditiously.

All time must be accounted for in question 14(a) including all self-employment, and showing all residence addresses during periods of unemployment. To expedite consideration of this application, if possible attach a letter from each employer listed confirming the capacity in which candidate was employed, the dates of employment, and conditions under which he left. If self-employed, indicate name or trade style, and all addresses at which candidate conducted business. Supply names and addresses of references for any period of self-employment, also unemployment of 6 months and over. If previous employer is out of business please indicate, and supply names and addresses of references to be contacted for verification.

Important: If candidate has served with the U.S. armed forces within the last 10 years, give dates, branch of service, rank or rate, identification number(if any) and type of discharge. A copy of the Discharge Papers(DD214) may also be attached.

Insert Carbon When Completing Next Page

17 Battery Place North
New York, NY 10004
(212) 623-8000

New York, American and other Principal Exchange

ANTHONY DE MEO EMPLOYMENT

5/64 - 7/64 Methodist Hospital (Patient)

7/64 - 2/65 Manufacturers Hanover Trust
67 Broad Street, New York, NY

2/65 - 2/24/65 Methodist Hospital

3/65 - 7/65 Unemployed

THE TEN YEAR LIMIT DOES NOT APPLY TO THE FOLLOWING ITEMS THROUGH).29

16. (a) Have you ever been registered as a representative of a member of the N.A.S.D.? Yes 0 No X

(b) Are you presently employed by a member of the N.A.S.D. other than the present sponsor? Yes 0 No X

If "yes", give name, address and position held_____

(c) Have you taken the N.A.S.D. examination for registration? Yes 0 No X

If "yes", on what date?____ Grade? ___

17. (a) Are you at present engaged in any other business, either as a proprietor, partner, officer, director, trustee, employee or otherwise? Yes X No 0

If "yes", give details, including name and address. your title or capacity, nature of business, duties, compensation received, time spent, etc._____

Bob Chevy Orchestras 1806 Flatbush Avenue Brooklyn, NY Musician Weekends #92 4 hours

(b) Do you currently hold an insurance license? Yes 0 No X

If "yes", give state(s) where licensed--

(c) Do you currently hold a real estate license? Yes 0 No X

If "yes", give state(s) where licensed--

18. I am presently employed by:

CBWL-H

19. I have been bonded by (specify bonding company, amount, and whether currently in effect)_____

Continental Insurance Co. - Current

20. (a) Have you ever been refused a bond by

a surety company? Yes 0 No X

(b) Has any surety company paid out any funds on your coverage? Yes 0 No X

If answer to either (a) or (b) is"yes", attach details.

21. (a) Have you ever been a member of any stock exchange, commodity exchange, or registered association of security or commodity brokers, dealers, investment bankers or investment advisors? Yes 0 No X

If "yes", give name(s) and dates._____

(b) Are you at present a member of any such exchange or registered association? Yes 0 No X

If "yes", give name(s)_____

22. (a) Have you ever been suspended, expelled, fined, censured or otherwise disciplined by any regulatory body or by any exchange or association: or ever been refused membership therein; or ever withdrawn your application for such membership? Yes 0 No X

(b) Have you ever been associated with any organization, as director, controlling stockholder, partner, officer, or other representative of a broker-dealer which has been, or a principal of which has been, suspended or expelled from any exchange or registered association, or was refused membership therein, or withdrew an application for membership; or whose registration as a broker-dealer with the SEC or any State or agency has been denied, suspended or revoked? Yes 0 No X

(c) Are you now subject to an order of the N.A.S.D., any national securities

exchange or S.E.C. which revokes, suspends or denies membership or registration? Yes 0 No X

(d) Have you ever been named as a "cause" in any action mentioned in the preceeding questions taken with respect to a broker-dealer? Yes 0 No X

(e) Have you ever been enjoined, temporarily or otherwise from selling or dealing in securities or commodities or from functioning as an investment advisor? Yes 0 No X

(f) Have you ever been a principal or employee of any corporation, firm, or association which was enjoined temporarily or otherwise from selling or dealing in securities or commodities or from functioning as an investment advisor? Yes 0 No X

23. If answer to questions 22 (a), (b), (c), (d), (e), or (f) is "yes", supply following information:

Nature of such action: Revocation_____
Expulsion____ Suspension__Injunction___
Other_____
Action taken by__Date of such action____
If suspended, give date of termination of suspension_____
Name of broker-dealer subject to such order_____
Nature of your affiliation with such broker-dealer_____

31. Further, and in consideration of the New York Stock Exchange, Inc.'s approving this application, I submit myself to the jurisdiction of such Exchange, and I agree as follows:

(a) That I will not guarantee to my employer or to any other creditor carrying s customer's account, the payment of the debit balance in such account, without the prior written consent of the Exchange.

(b) That I will not guarantee any customer against loss in his account or in any way represent to any customer that I or my employer will guarantee the customer against such losses.

(c) That I will not take or receive, directly or indirectly, a share in the profits of any customer's account or share in any losses sustained in any such account.

(d) That I will not make a cash or margin transaction or maintain a cash or margin account in securities or commodities, or have any direct or indirect financial interest in such a transaction or account, except with a member organization or with a bank. I understand and agree that no such transaction may be effected and no such account may be maintained without the prior consent of my employer, and that except for Monthly Investment Plan transaction such employer must receive promptly, directly from the carrying member or organization or bank, duplicate copies of all confirmations and statements relating to such transactions or account. I further understand and agree that I shall receive no compensation for commission or profits earned on nay transaction or account in which I have a direct or indirect financial interest, except with the approval of my employer and in accordance with the rules of the Exchange.

(e) That I will not rebate, directly or indirectly to any person, firm, or corporation any part of the compensation I receive as a registered employee and I will not pay such compensation or any part thereof, directly or indirectly, to any person, firm, or corporation, as a bonus, commission, fee or other consideration, for business sought or procured for me or

for any member or member organization of the Exchange.

(f) That at any time, upon the request of the Department of Member Firms, or of any Committee or other Department of the New York Stock Exchange, Inc., I will appear before such Committee or Department and give evidence upon any subject under investigation by such Committee or Department, and that I will produce, upon request of the Exchange, all of my records or documents relative to any inquiry being made by the Exchange.

(g) I understand that any changes in compensation in any form, or additional compensation in any form, may be subject to disapproval by the New York Stock Exchange, Inc., and that I may not be compensated for business done by or through my employer after the termination of my employment, except as may be permitted by the Exchange.

(h) I agree that I will not take, accept or receive, directly or indirectly, from any person, firm, corporation, or association, other than my employer compensation of any nature, as a bonus commission, fee gratuity or other consideration, in connection with any securities or commodities transaction or transaction, except with the prior written consent of the Exchange.

(i) I will notify the Department of Member Firms promptly if, during the tenure of my employment, I become involved in any litigation or if any judgments are found against me; or if my registration or license to sell or deal in securities or to function as an investment advisor is ever refused, suspended or revoked; or if I become enjoined, temporarily or otherwise, from selling or dealing in securities or from functioning as an investment advisor; or if I am arrested, summoned, arraigned or indicted for a criminal offense; or if I become involved in bankruptcy proceedings.

(j) I agree that any controversy between me and any member or member organization or affiliate or subsidiary thereof arising out of my employment or the termination of my employment shall be settled by arbitration at the instance of any such party in accordance with the arbitration procedure

prescribed in the Constitution and rules then obtaining of the New York Stock Exchange, Inc.

(k) If the New York Stock Exchange, Inc., during the period of 30 days immediately following termination of my employment, gives me written notice that the Exchange is making inquiry into any specified matter or matters occurring prior to termination of such employment, I agree that I will thereafter comply with any request of the Exchange for me to appear and testify, submit records, respond to written requests, attend hearings, and accept disciplinary charges or penalties with respect to the matter or matters specified in such notice in every respect in conformance with the Constitution and Rules and practices of the Exchange in the same manner and to the same extent as required to do if I had remained an employee. If I refuse to accept such written notice or, having been given such notice, refuse or fail to comply with any such request of the Exchange, I agree that such refusal or failure may, in the discretion of the Exchange, act as a bar to future Exchange approval of my employment until such time as the Exchange has completed investigation into the matter or matters specified in such notice; has determined a penalty, if any, to be imposed against me; and until the penalty, if any, has been carried out.

Anthony J. DeMeo
297 Ramapo Valley Road
Mahwah, NJ 07430
(H) 201-529-4412
(W) 201-524-4899

Executive Summary: Seasoned professional with over 25 years of diversified experience and exceptional performance in the securities industry, including employee management, project management, finance, business planning, marketing, and strategy. Current consulting engagement to develop advanced broker workstation for global high net worth business and back office systems to support fee-based asset management business.

EXPERIENCE

Smith Barney Shearson, Inc. New York, NY

Senior Vice President

* Marketing Director, High Net Worth Services 1/94 - 9/94
* Chief Information Officer, Private Client Group 7/93- 1/94

Shearson Lehman Brothers Inc. New York, NY

* Chief Information Officer, Private Client Group6/92 - 7/93
* Associate Director of National Sales 6/90 - 6/92

Shearson Lehman Hutton, Inc. New York,NY

* Chief Administrative Officer, Financial Services Division 3/89 - 6/90
* Marketing Director for Shearson's "central asset account" [FMA] 5/88-3/89

Shearson Lehman Brothers Inc. New York, NY

* Marketing Director for Shearson's "central asset account" [FMA] 1/87 - 5/88
* Director of branch Operations 5/85- 1/87

Shearson Lehman American Express New York,NY

* Director of Branch Operations 4/84 - 5/85

Shearson American Express Inc. New York NY

First Vice President

* Director of General Services 6/81 - 4/84

Shearson Loeb Rhoades Inc. New York NY

* Director of General Services 12/79-6/81

Shearson Hayden Stone Inc. White Plains NY

* Director of General Services 1/76-12/79
* Regional Operations Manager 4/74-1/76

Hayden Stone Inc. White Plains NY

* Regional Operations Manager 1/73 - 4/74

Second Vice President

* Branch Administrative Manager White Plains Branch 1/71 -1/73

CBWL-Hayden Stone Inc. New York NY

* Branch Administrative Manager White Plains Branch
* Manager Mutual Funds Operations, Re-Organization Dept. 9/70-1/71

Hayden Stone Inc. New York, NY

* Manager Mutual Funds Operations 2/68-9/70

SELECTED ACCOMPLISHMENTS

Developed a program awarding special services which enhanced the productivity and business quality of life for the top 5% of Smith Barney's sales force.

Conceived and developed a strategy and business/systems plan for state-of-the-art broker workstation platform

Improved Shearson's broker and client information systems by re-engineering and simplifying the access and use of "key"

broker information screens.

Designed and managed the implementation and marketing of Shearson's monthly statement, which has become the benchmark for the securities industry.

Developed and designed the Broker Information System for Shearson's tax lot accounting system [GLAS], the largest tax lot accounting system on Will Street.

Conceived and oversaw the development and implementation of the "Preferred Client Program [PCA], enabling the firm to more profitably and efficiently penetrate and serve high asset clients.

Designed and implemented a highly advanced system that enabled the broker to: view all the accounts in a household, consolidate statements for mailing purposes, track total assets and commissions, maintain telephone numbers and a note feature to keep track of conversations and trigger important follow up dates.

Coordinated all system initiatives for the Private Client Group, including Shearson's automated order entry system, an on line National telephone directory, an E-Mail system and a Dividend Reinvestment program for over 3,000 Listed securities.

Managed a fixed budget of over S85 million to run General Services, including: Graphics, Printing, Purchasing, Supplies, Proxy, Mail, Messengers, and Distribution. Oversaw the design of what is considered one of the largest and most sophisticated print and distribution facilities in New York.

Created "Laser Grams," a direct mail program which enabled the firm the ability to target selected clients with personalized messages from the broker.

EDUCATION

* Ramapo College - Mahwah, New Jersey
* Xerox Corp.'s Executive Development Program
* New York Institute of Finance courses: Securities Clearance, Branch Operations, Legal Transfer, Margin
* The Drucker Management Development Program
* Securities Industry Association - Wharton School

NEW YORK STOCK EXCHANGE, INC.
Department of Member Firms
4 NEW YORK PLAZA
AT BROAD AND WATER STREETS
NEW YORK, N.Y. 10004
Division of
Member Offices and Personnel

Mr. Lester DeMott
Hayden Stone Inc.
17 Battery Place North
New York, N.Y. 10004

October 23, 1972

We currently have an RE-1 application for approval of employment submitted by your firm on behalf of Mr. Anthony John DeMeo on July 7, 1972.

Since his application has been held active beyond the normal training period and an examination request has not been received, nor has any further action been taken by your firm we are closing our files on him.

Should you make a request at some later date we would be happy to reopen the file and continue processing the application.

If you have any comments please feel free to write or call me.

Very truly yours,

/s/

James R. Davis
Manager

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ANTHONY DE MEO — 95 Civ. 5791 (KMW)

Plaintiff

-against-

SMITH BARNEY INC., THE TRAVELERS INC., and TONI ELLIOTT.

Defendants

PLAINTIFF'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS WITH RESPECT TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

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PLEASE TAKE NOTICE that, pursuant to Rule 34 of the Federal Rules of Civil Procedure, defendants are hereby requested to produce and permit plaintiff to inspect and copy each of the documents specified below at the offices of WISEHART & KOCH, 19 West 44th Street, Suite 412, New York, New York 10036, on or before March 8, 1996.

DOCUMENTS REQUESTED

Identify the location of the documents that refer to the following subjects and produce the documents that refer or relate thereto:

1. Any and all documents in defendants' possession or under their direction, supervision or control that are referred to in, or that are the source of the entries made on the Central Registration Depository Record annexed hereto, as produced by the National Association of Securities Dealers, that have reference to Anthony DeMeo.

2. Any and all documents in possession of or under the direction, supervision or control of the defendants that refer to the NASD Central Registration Depository, its uses and purposes.

DEFINITIONS AND INSTRUCTIONS

As used herein, the term "document" is synonymous in meaning and equal in scope to the usage of the term in Rule 34 of the Federal Rules of Civil Procedure. A draft or non-identical copy is a separate document within the meaning of this term, which also includes without limitation tapes, tape recordings, wires, film, sound recordings and/or transcripts thereof and information stored in the memory bank of a computer; reports and/or summaries of investigations; and opinions and reports of consultations; other reports; correspondence with opinions of counsel; other records; brochures; pamphlets; notices; newspaper items; circulars; trade letters; drafts of any documents; original or preliminary notes; marginal comments appearing on any document; any other information contained in any papers, writing or physical thing.

If any document is claimed to be privileged, identify the same, stating, in addition to the information otherwise required for such information in S.D.N.Y. Civil Rule 46(e), (i) the identification of any persons who either sent or received the original or any copy thereof, and (ii) the precise basis on which such privilege is claimed as to each part of the document with respect to which the privilege is claimed, with identification of the contents thereof in sufficient detail to permit an evaluation of said claim of privilege.

(1) All documents requested include all attachments and enclosures. Any document(s) in part responsive to a Request shall be produced in their entirety.

(2) Each Request requires that documents either be produced in the same form or in the same order in which they existed prior to production (e.g., in the manner in which they are kept in the usual course of business; in the boxes, file folders, bindings or other containers in which the documents are found; and/or with the title, labels or other descriptions left intact); or that documents be produced in an organized fashion and labeled to correspond with each individual Request to which they are responsive.

(3) If a document is produced in redacted form, state with particularity the reason(s) it is not produced in full, and describe generally those portions of the document which are not being produced sufficient to describe and identify the redacted portions for purposes of a motion to compel their production.

(4) If production of any requested document is objected to on the grounds that it is burdensome or oppressive, identify:

(a) the precise reasons why production poses a special burden;

(b) the approximate number of document(s) which have been called for; and

(c) the location(s) of the document(s) which have been called for.

(5) With respect to each document that has been lost, destroyed or otherwise disposed of since its preparation or receipt, identify the document and give the full particulars or circumstances whereby the document was lost, destroyed or otherwise disposed of.

(6) In all cases where originals and/or non-identical copies are not available, "documents" also means identical

copies of original documents and copies of non-identical copies.

(7) Production of documents in connection therewith, should be interpreted to include electronic mail, voice mail, and all related computer information.

(8) Included would be the production of any and all relevant computer files, active and/or archival, whole or partial, in physical, electronic or any tangible or translatable form, and records, backups, indices, lists, abstracts, and/or summaries thereof, including data, calculations, electronic communications and/or exchanges, mail and/or voice mail and/or bulletin board services, whole or partial, whether extant or deleted, unstored, erased, or overwritten, translatable in reasonably usable form, as well as abstracts or directories, histories, indices or any record of any such information, its production, storage, interpretation, use or destruction.

(9) This would apply to all computer systems under the control of the company or its employees, agents, consultants and/or communications carriers, including, without limitation, mainframe computers and/or MacIntosh or other desktop computer systems, mini-computers, tower data bases, portable computers, notebook computers, lap-top computers, and/or all other types of data communication, processing and/or storage systems.

(10) This would also apply to voice mail or other messages sent through AT&T and/or other carriers and their computer systems, and the billing information relating thereto.

(11) All affected persons, employees, agents, consultants and/or communications carriers be immediately notified to preserve any and all computerized information that may be responsive to this request or relevant to the issues raised by this litigation.

(12) Defendants are expected to use applicable definitions to the undefined words in accordance with custom and usage of the English language.

(19) Unless otherwise indicated, the time period of this Request is from July 1964 to the date of your response.

(20) The document requests shall be deemed continuing so as to require further and supplemental production if you receive or generate additional documents between the time of original production and the time of trial.

Dated: New York, New York
March 6, 1996

/s/
Arthur M. Wisehart (AMW 4003)

WISEHART & KOCH
19 West 44th Street
Suite 412
New York, New York 10036
(212) 730-0044

Attorneys for Plaintiff
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